Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

MARILYN L. HUDSON,

Petitioner,

vs.

JANET RENO, Attorney General of the United States,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether compensatory damages for intentional employment discrimination allowed by Civil Rights Act of 1991, 42 U.S.C. § 1981a, are inclusive of front pay — heretofore awarded as an equitable remedy authorized by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g)?

Whether compensatory damages for intentional employment discrimination to a sole plaintiff-employee under the Civil Rights Act of 1991 are limited by the application of a single damage "cap" under 42 U.S.C. § 1981a(b)(3) where there is proven liability of the employer for both sex discrimination and retaliation for having complained of such discrimination?

Whether it is contrary to the requirement that an award of attorneys' fees to a prevailing Title VII plaintiff be "reasonable" that: (a) the billing rate used by the court in calculating the fees for the services of plaintiff's lead counsel were fixed using local rates where both plaintiff and the large employer-defendant used counsel based in a larger, higher attorney fee rate locale; (b) the post-trial legal work of plaintiff's counsel was not compensated at all although a substantial back pay award was obtained for plaintiff as a result of such legal work; and (c) a cut of 25 percent was made in the attorney's fee awarded for the work of plaintiff's local counsel during the trial (in which he was the second-chair to her lead counsel) where the defendant Department of Justice had four attorneys at counsel table throughout the trial?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Marilyn L. Hudson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 130 F.3d 1193 and is reproduced in the Appendix ("App.") filed herewith at 1a. The unreported decisions of the district court in this case are reproduced at App. B at 35a and App. C at 76a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 4, 1997. Rehearing *en banc* was denied on March 10, 1998. The Court of Appeals mandate issued on March 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, are set forth below:

> 42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment
>
> (a) Right of recovery
>
> (1) Civil rights
>
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment that is unlawful

> because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C. §§ 2000e-2, 2000e-3, or 2000-e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g), from the respondent.
>
> (b) Compensatory and punitive damages
>
> * * *
>
> (3) Limitations
>
> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, . . . shall not exceed, for each complaining party —
>
> * * *
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), are set forth below:

> 42 U.S.C. § 2000e-5. Enforcement provisions
>
> * * *
>
> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

* * *

(k) Attorney's fees; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Marilyn Hudson was the victim of a duel campaigns against her while she was an Assistant United States Attorney for the Eastern District of Tennessee: one of sex discrimination and one of retaliation for having complained about sex discrimination, and each mounted

by her superiors at the Department of Justice. After a more than two-week long trial, on October 14, 1994, a well-instructed jury returned a verdict for plaintiff, concluding not only that Justice Department management (both in the U.S. Attorney's office in the Eastern District of Tennessee and in the Executive for United States Attorneys in Washington, D.C.) had engaged in campaigns of sex discrimination and reprisal against Ms. Hudson, but also that those very unlawful activities by the government had ultimately caused Ms. Hudson to suffer a constructive discharge from her employment with the Justice Department. The jury awarded compensatory damages to Ms. Hudson in the amounts of $250,000 for the injury done by the Department of Justice's unlawful sex discrimination, $500,000 for injuries she suffered as a result of the Department's unlawful retaliatory conduct, and $750,000 for the injuries stemming from the government's unlawfully motivated constructive discharge of her from federal employment — a total compensatory damage award of $1.5 million. Order on Jury Verdict of the United States District Court for the Eastern District of Tennessee (October 24, 1994). App. E at 132a.

The district court, however, promptly reduced the jury's damage award to a total of $300,000. This was on the basis of the trial court's understanding of the applicable "cap" on awarded damages imposed by the Civil Rights Act of 1991, 42 U.S.C. § 1981a, specifically subsection (b)(3)(D). This compensatory damages reduction was on October 24, 1994. *Id.* App. E at 134a.

Then, on August 10, 1995, after receiving extensive briefs by the parties, the district court issued its findings of fact and conclusions of law. These addressed both Ms. Hudson's pre-November 21, 1991 allegations of, *inter alia*, sex discrimination and retaliation against her by the Justice Department, evidence of which had been adduced during the trial,[1] and the equitable relief issues concerning her post-

1. In addition to her claims of intentional sex discrimination and retaliation and intentional discriminatory/retaliatory constructive discharge occurring after (Cont'd)

November 21, 1991 discrimination/retaliation claims that remained as remedial questions in the wake of the jury's verdict and its award of compensatory damages (albeit as reduced by the court under its reading of § 1981a(b)(3)(D)).[2] The jury verdict notwithstanding, with regard to the equitable relief due in connection with Ms. Hudson's

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(Cont'd)
November 20, 1991 — and thus, covered by the Civil Rights Act of 1991 and thereby subjecting her employer to an award of compensatory damages and to a trial by jury under that Act (as that was the date on which the 1991 Act was signed into law and became effective), Ms. Hudson's initial complaint and second, amended complaint also contained timely allegations of pre-November 21, 1991 acts of sex discrimination and retaliation by the Justice Department, as well as allegations of the government's violation of the Privacy Act (5 U.S.C. § 552a) and the Equal Pay Act of 1963, as amended (29 U.S.C. § 206). As there is no right to a jury trial for pre-1991 Act Title VII claims, or for Privacy Act claims, or for claims against federal employers under the Equal Pay Act, all these allegations were left to the trial judge to decide, although a single trial was held as evidence concerning these claims was relevant to the claims that were before the jury. While Ms. Hudson submits that the trial judge's findings and conclusions concerning the claims left to him for decision on liability were utterly contrary to the verdict of the jury and that the overwhelming weight of what the jury found to be the credible evidence compelled a finding in favor of Ms. Hudson on the pre-1991 Act discrimination claims and the Equal Pay Act claim, as there doubtlessly is some evidence — rejected by the jury to be sure — that could support the trial court's view of the pre-November 21, 1991 environment, and given the standard of review on appeal when challenging factual findings of the trial court, she reluctantly forewent a challenge to those findings in the Court of Appeals. Moreover, although a challenge regarding to the Privacy Act holdings of the district court — being a mixture of fact finding and legal conclusion, and thus of a different character — was mounted in the appeal to the Sixth Circuit, it is reluctantly not being included as an issue in this petition for a writ of certiorari.

2. One issue of equitable relief that was deferred for still later consideration by the district court was the award to plaintiff of reasonable attorney fees as part of costs under 42 U.S.C. § 2000e-5(k). As we note *infra*, an award of attorney fees and costs to Ms. Hudson as the prevailing party in this litigation was made by the trial court on January 16, 1996, after additional briefing by the parties. App. B at 35a.

post-November 20, 1991 sex discrimination and retaliation claims under Title VII, the district court concluded that the reinstatement of Ms. Hudson to her Assistant U.S. Attorney position was not "a viable option" based largely on the existence of hostility between the parties (which, of course, the jury had attributed to the unlawful attitudes on the part of Justice Department managers). Having refused to order reinstatement, the trial court also refused to award Ms. Hudson any front pay whatsoever. In fact, the only monetary equitable relief provided to Ms. Hudson by the district court in its post-trial findings of fact and conclusions of law was an award of back pay in the amount of $164,330.96 (plus prejudgment interest thereon in the amount of $13,812.78), which was for the time period from her departure from government service in September 1993 due to the unlawful constructive discharge through August 10, 1995, the date the findings and conclusions were issued. Thus, the total monetary relief awarded to Ms. Hudson by the district court, both to compensate her for the injury suffered as a result of sex discrimination and unlawful retaliation against her from November 20, 1991 onward, including the termination of her employment, and to make her whole, was $478,143.74 (plus post-judgment interest thereon).[3] Judgment on a Civil Case of the United States District Court for the Eastern District of Tennessee (Filed August 17, 1995). App. D at 131a.

In its final action in the case, on January 16, 1996, the district court awarded Ms. Hudson attorneys' fees and other costs pursuant

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3. The district court also ordered the government

> to credit and/or restore plaintiff's annual leave and sick leave that would have been accrued from September 4, 1993, through the date of payment of all back pay due hereunder, and to pay her for all such restored annual and sick leave at the salary level she would have had during that time as an AUSA.

Naturally, this translated into some small amount of monetary relief to Ms. Hudson as well.

to 42 U.S.C. § 2000e-5(k). In doing so, however, the trial judge refused to utilize the usual and customary billing rates of Ms. Hudson's victorious Washington, D.C.-based lead counsel (which was also the home base of all government counsel) and, instead, substituted the substantially lower billing rate he found to be the appropriate for Knoxville, Tennessee — the site of the trial and the events involved in the case. In addition, and notwithstanding the fact that her counsel's post-trial efforts had resulted in a substantial award of back pay to Ms. Hudson, the district judge refused to award her attorneys' fees for any of her counsel's post-trial legal work. Also, despite the fact that the government had been represented throughout the trial by four Washington, D.C.-based Department of Justice attorneys at defendants' counsel table and at the pretrial conference by two of these attorneys, the district court cut by a flat 25 percent the billing time for trial preparation, while at the pretrial conference and while actually at the trial, of Ms. Hudson's single "second chair" attorney who assisted her lead counsel during the trial at counsel table and at the pretrial conference. By these actions alone, the district court effected a reduction of the total attorneys' fees awarded to Ms. Hudson for the successful efforts of her attorneys by about 50 percent.[4] Order of the United States District Court for the Eastern District of Tennessee Partially Granting and Partially Denying Plaintiff's Motion for Award of Costs and Attorneys' Fees (January 16, 1996). App. B at 49a-71a.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed each and every post-trial ruling of the district court. 130 F.3d at 1209. App. A at 34a. In affirming the trial court's denial of both reinstatement (*i.e.*, ordering Ms. Hudson to be returned to

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4. In addition, the district court refused to award fees for a large amount of legal work on grounds that it was identified with claims on which Ms. Hudson had not prevailed or on matters for which no fee award was due. Among such uncompensated legal services was all legal work that was performed by Ms. Hudson's first two lead counsel and their respective associates. 130 F.3d at 1207-08. App. A at 30a-31a.

employment as an AUSA) *and* front pay, the Court of Appeals turned a blind eye to years of precedent — from virtually every Circuit, including the Sixth Circuit itself. *Id.* 130 F.3d at 1201-04. App. A. at 16a-22a. Indeed, the Court ignored completely an official interpretation of the Equal Employment Opportunity Commission when it held that front pay is subsumed within the compensatory damages awarded to Ms. Hudson pursuant to 42 U.S.C. § 1981a(b). In addition, and in a direct dismissal of another formal position of the Equal Employment Opportunity Commission, the Sixth Circuit concluded that damages to a plaintiff under 42 U.S.C. § 1981a(b) are limited to a single application of the appropriate statutory damage "cap" no matter that there may have been more than one separate and distinct violation of the covered equal opportunity provisions — *e.g.*, sex discrimination, followed by retaliation for complaining about such discrimination. *Id.* 130 F.3d at 1199-1201. App. A. at 9a-16a. The appeals court cleaved to this view even in the instant situation where such separate Title VII violations (*i.e.*, sex discrimination and retaliation) continued during the litigation and increased in intensity to the point of causing the victim to suffer a career ending constructive discharge. Finally, the Sixth Circuit affirmed the trial court's reductions in the fee award to Ms. Hudson, thereby permitting Ms. Hudson to receive less than full equitable relief despite the jury's verdict that she had been the victim of dual campaigns of sex discrimination and retaliation that ultimately led to an involuntary end to her career as an AUSA. *Id.* 130 F.3d at 1207-09. App. A. at 30a-34a.

Rehearing *en banc* was timely sought, but was refused by the Court of Appeals by order dated March 10, 1998. Order of the United States Court of Appeals for the Sixth Circuit (March 10, 1998). App. F at 136a.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S NOVEL HOLDING THAT FRONT PAY IS PART OF COMPENSATORY DAMAGES AWARDED UNDER 42 U.S.C. § 1981a IS IN DIRECT CONFLICT WITH ALL OTHER AUTHORITIES, INCLUDING A RECENT SPECIFIC HOLDING OF THE SEVENTH CIRCUIT THAT FRONT PAY IS AN EQUITABLE REMEDY UNDER TITLE VII, ONE THAT IS SEPARATE AND DISTINCT FROM THE COMPENSATORY DAMAGES AVAILABLE PURSUANT TO § 1981a.

Notwithstanding the jury's verdict that Ms. Hudson had been constructively discharged from her job as an Assistant U.S. Attorney by the Department of Justice based on sex discrimination and unlawful retaliation, the district court denied her both reinstatement and front pay. In affirming that decision, the Sixth Circuit reasoned that Ms. Hudson had in effect already received an award of front pay, holding that front pay is compensation for future pecuniary losses and is thus part of the award of compensatory damages to plaintiff under 42 U.S.C. § 1981a(b)(3). *Hudson v. Reno*, 130 F.3d at 1202-03. App. A at 21a. In this, the Sixth Circuit is at odds with all other authorities regarding the nature and availability of a front pay remedy under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g).

More particularly, on this issue the U.S. Court of Appeals for the Seventh Circuit recently came to the directly opposite conclusion from that reached by the Sixth Circuit here, holding that an equitable award of front pay under 42 U.S.C. § 2000e-5(g) and an award of compensatory damages for "future pecuniary losses" under 42 U.S.C. § 1981a(b)(3) were separate and distinct remedies that compensate a victim of unlawful employment discrimination for different injuries,

and that both such remedies could properly be awarded to a victim of discrimination. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998). The Seventh Circuit's conclusion that the equitable remedy of front pay under the original Civil Rights Act of 1964 and legal damages for future pecuniary losses under the supplementing Civil Rights Act of 1991 were separate remedies for different injuries was reached through an in-depth analysis of these remedies and the statutory schemes in which they are applied to employment discrimination. 137 F.2d at 951-45. For its part, the Sixth Circuit's opposite conclusion that these remedies are identical — and, therefore, duplicative — was the product of a dictionary-defined "plain meaning" of the separate words composing the phrase "future pecuniary losses" and a comparison with a claimed widely accepted definition of "front pay" — the essence of which as reviewed by the court omits the key reference to its pairing with, as necessary substitute for, the equitable remedy of reinstatement. *See Hudson*, 130 F.3d at 1203. App. at 20a-21a.

Moreover, the Seventh Circuit's view of front pay in the Title VII context as an equitable remedy — as contrasted with a component of a compensatory damages covering "future pecuniary losses" — is supported by virtually every court of appeals decision prior to the Sixth Circuit's decision in *Hudson v. Reno*. *See Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1177 n.7 (2d Cir. 1996); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1002 (10th Cir. 1996); *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995), *cert. granted in part*, 516 U.S. 804, *cert. dismissed*, 516 U.S. 1155 (1996); *Weaver v. Casa Gallardo*, 922 F.2d 1515, 1528 (11th Cir. 1991); *Carter v. Sedgwick County*, 929 F.2d 1501, 1505 (10th Cir. 1991); *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990); *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1279 (10th Cir. 1988); *Green v. USX*, 843 F.2d 1511, 1531 (3d Cir. 1988). Indeed, pre-*Hudson*, even Sixth Circuit authority is on all fours with the Seventh Circuit's view that front pay under Title VII is an equitable remedial alternative to reinstatement, *not* the equivalent of a damage remedy

for "future pecuniary losses" under § 1981a(b)(3). *See Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985). In fact, in cases arising during the pre-1991 Act period — when the legal remedy of compensatory damages was unavailable under Title VII to victims of intentional employment discrimination — the only Court of Appeals even to raise a question about the availability of front pay as a remedy under Title VII because it may not be an equitable remedy at all but compensatory damages was the Seventh Circuit, in *Fortino v. Ouasar Company*, 950 F.2d 389, 398 (7th Cir. 1991), and that issue was quickly dispelled by the Seventh Circuit itself.[5]

Additionally, the Sixth Circuit's new and rather curious view of front pay as synonymous with compensatory damages for "future pecuniary losses" deviates directly from the published guidelines of the Equal Employment Opportunity Commission on the remedies available for victims of intentional Title VII violations occurring after enactment of the Civil Rights Act of 1991. In its official interpretation of the new "legal" remedies (damages) of the 1991 Act as compared to the "equitable" remedies provided by Title VII before passage of the 1991 Act, the EEOC, like the Seventh Circuit's holding in *Williams v. Pharmacia, Inc., supra*, specifically concluded that compensatory damages under the § 1981a(b)(3) are in addition to the equitable relief provided pursuant to § 2000e-5(g), including specifically both back pay and front pay. *See* "EEOC: Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act", 8 FEP Manual, Labor Relations Reporter (BNA), at 405:7095. This view — by the agency charged by Congress with the expertise in the field of

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5. *Fortino v. Ouasar Company* involved a claim of age discrimination under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621, *et seq.* In *dicta*, the Seventh Circuit merely raised a question of whether front pay was available as a remedy in a Title VII case as "Title VII authorizes only equitable relief and frontpay [*sic*] resembles common law damages for breach of employment contract." 950 F.2d at 398. However, the court quickly came to the conclusion, albeit in the context of the ADEA, that front pay is an equitable remedy (one for which no right to a jury determination exists). *Id.*

employment discrimination — should carry great weight with the courts; indeed, the EEOC's views on such issues are entitled to substantial deference. *Equal Employment Opportunity Commission v. Commercial Office Products Co.*, 486 U.S. 107, 115-16 (1988).

The point, of course, is that there is a clear split in the circuits on the question of the nature of the front pay remedy in the context of Title VII litigation. Is it an equitable remedial alternative to reinstatement, separate and distinct from compensatory damages for future pecuniary losses, as the Seventh Circuit held in *Williams*? Or is it now just a synonym for legal compensatory damages, as the Sixth Circuit has concluded in the instant case? Along this fault-line, the novel holding of the Sixth Circuit in the case at bar stands alone, at odds directly with the Seventh Circuit's holding in *Williams v. Pharmacia, Inc.* and with the EEOC's Policy Guide, and at odds with the virtually universal pre-1991 Act view of front pay in Title VII claims as an equitable remedial alternative to reinstatement (including even the Sixth Circuit's own view).

To repair this split in the circuits, and to ensure uniform remedies are available under the principal federal equal employment law, this petition should be granted. Leaving matters as they now stand will result in two classes of victorious victims of discrimination with the same injuries, but with differing relief: Those who are awarded compensatory damages (for, *inter alia*, "future pecuniary losses") and who are reinstated to their jobs by the trial judge; and those who are awarded compensatory damages, but who are denied reinstatement by the trial judge because of continuing employer hostility. Members of the second class receive no equitable relief whatsoever on account of their loss of employment. This inequity, applicable just in the Sixth Circuit, cannot be permitted to stand.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S CONSTRUCTION OF THE DAMAGE LIMITATIONS CONTAINED IN 42 U.S.C. § 1981a(b)(3) ALLOWING ONLY A SINGLE "CAP" AMOUNT TO A VICTIM OF BOTH SEX DISCRIMINATION *AND* RETALIATION IS CONTRARY TO THE INTENT OF CONGRESS IN ENACTING THE CIVIL RIGHTS ACT 1991 AS FOUND BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE AGENCY TO WHOSE EXPERTISE THE SIXTH CIRCUIT SHOULD HAVE DEFERRED ON THE ISSUE OF DAMAGE CAP CONSTRUCTION.

With regard to the limitations on damages under the Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a(b)(3), the Sixth Circuit held those limitations to mean that damages against a defendant-employer to an individual plaintiff are limited to a single application of the appropriate damages "cap"[6] — *no matter how many intentional violations of Title VII that defendant-employer has visited upon that plaintiff.* This holding rests squarely on the appeals court's conclusion that the "plain language" of the statute unambiguously evidences a Congressional intent to limit damages to a single cap for each plaintiff who brings suit. This conclusion, in turn, depends on the appeals court's reading of the term "action" as used at the very beginning of subsection 1981a(a)(1) in the phrase

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6. 42 U.S.C. § 1981a(b)(3) sets various limitations on the amount of damages awardable for intentional violations of Title VII based on the size of the employer-defendant, weighed by the number of persons it employed per week over a period of 20 weeks in the immediate calendar year or the calendar year previous to claims being asserted. It was undisputed that the employer here, the Department of Justice, regularly employing over 500 persons, was subject to the highest damage cap under subsection 1981a(b)(3)(D) — $300,000. *See Hudson v. Reno, supra,* 130 F.3d at 1199 n.3 App. A at 10a.

> In an *action* brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C. § 2000e-5 or § 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . .

[emphasis added], to plainly, simply and unambiguously mean a "civil action" — *i.e.*, a "law suit brought in court." *Hudson v. Reno, supra,* 130 F.3d at 1200. App. A at 11a-12a.[7]

However, the very context in which the term appears in the above-quoted § 1981a(a)(1) undercuts the contention that "action" as used there was meant to be synonymous with a "civil action" or a "law suit in court." Indeed, linking of the term "action" to the terms "complaining party" and "respondent," as is the case in subsection(a)(1), must lead anyone familiar with the complex discrimination complaints process under Title VII to read "action" as having a meaning broader than a "law suit in court" or a "civil action." In fact, linking "action" to these specific terms should lead those knowledgeable concerning Title VII to the inescapable conclusion that the term "action" references something akin to a "claim" or a "cause of action" — *i.e.*, something denoting an active allegation that a violation of Title VII has occurred.[8]

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7. The Court of Appeals used two definitions in deconstructing the term "action" in the statute to carry an unambiguous meaning of "a law suit brought in court" or a "civil action". The first was taken from Black's Law Dictionary (6th ed. 1991), p. 18; the second from Rules 2 and 3 of the Federal Rules of Civil Procedure. *See* 130 F.3d at 1200. App. A at 11a.

8. In fact, in a "law suit in court" — which under the Federal Rules of Civil Procedure is known formally as a "civil action," the parties are not called or referred to as "complaining party" and "respondent", but rather as "plaintiff" and "defendant." No doubt this is a fact of which Congress is well aware. Moreover, "complaining party" is not even the term used when Title VII claims and allegations are brought at the administrative level: there the terms used for an employee or applicant who claims

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The point is that 42 U.S.C. § 1981a does not in its "plain language" unambiguously provide that a damage award to a single individual victim of discrimination is limited to a single application of the appropriate damage "cap." In a word, the language of this statute on the availability of single damage cap versus multiple caps to a single victim of discrimination is *ambiguous*. Thus, the foundation of the Sixth Circuit's holding that the damage limitation under § 1981a(b)(3) is "one victim, one cap" is itself an illusion. Therefore, congressional intent on this issue must be gleaned from the legislative history and authoritative interpretations of it.

This is precisely the approach Ms. Hudson urged below, and it is what the Sixth Circuit wrongly rejected. In fact, the legislative history of the 1991 Civil Rights Act strongly supports the conclusion that Congress intended the limitations on damages to apply on a *per claim basis, not a per victim (no matter the number of claims) basis*. For example, while "for each complaining party" as used in § 1981a(b)(3) on its face might suggest an intent to limit the damages awardable to a discrimination victim to the amount in a single application of the appropriate "cap," an examination of the legislative history reveals that this phrase was added as a last minute amendment for the express purpose of making it clear that the damage caps contained in subsection (b)(3)(A)-(D) did not limit the damages available to each individual victim where several of them joined together as co-plaintiffs in a single administrative complaint or civil

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to have been the victim of unlawful discrimination are "charging party" and "person claiming to be aggrieved" when they are in the private sector (e.g., 29 C.F.R. § 1601.21(b)) or "complainant" when the claim concerns federal employment (*e.g.*, 26 C.F.R. § 1614.106(d)). And while the term "respondent" is used in the Title VII administrative complaints process for a private sector employer against whom a charge of discrimination has been lodged with the EEOC (*e.g.*, 29 C.F.R. § 1601.14(a)), the term is not generally used where the employer is an agency or department of the federal government — the proper term in that case being "agency" (29 C.F.R. §§ 1614.109 and 1614.110).

action. *See* joint statement of the amendment's co-sponsors, Senators Hatch (R-Utah) and Kennedy (D-Mass.), 137 Cong. Rec. S 15471 (daily ed. Oct. 30, 1991). Moreover, while it is thus plain that the "for each complaining party" language was added to expand the limitations on damages provision of 42 U.S.C. § 1981a, not as an additional limitation, an Interpretive Memorandum placed in the Congressional Record on passage of the final version of § 1981a by its sponsors in the Senate, led by Senator Danforth (R-Mo.), makes plain that the use of "action" was intended to link the damage caps to *claims* (*"for each cause of action brought"*), not claimants or "complaining parties":

> In addition for the above-cited restrictions, the following limitations also are placed on the damages available to each individual complaining party *for each cause of action brought* under section 1981A [*sic*]:
>
> * * *
>
> The amount of nonpecuniary damages, future pecuniary damages and punitive damages shall not exceed [the applicable "cap" based on the employer's size].

137 Cong. Rec. S 15484 (daily ed. Oct. 30, 1991).[9]

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9. This congressional understanding is further supported by a Section-By-Section Analysis placed in the Congressional Record after final passage of the Civil Rights Act of 1991, but before the President signed the Act into law, by one of the principal sponsors of the House version, Congressman Edwards (D-Cal.). Tracking the same language as used in the Interpretive Memorandum of the Senate sponsors, this analysis concludes:

> the limitations on damages awards in the legislation . . . apply to damages available to each individual complaining party *for each cause of action* brought under Section 1981a. (Cont'd)

All of this legislative history of the Civil Rights Act of 1991 was ignored or summarily dismissed as irrelevant by the Sixth Circuit when it erroneously concluded that use of the term "action" in subsection 1981a(a)(1) elevated the single cap view to the unambiguous intent of Congress as expressed in the plain language of the statute.[10] On the same erroneous grounds — the alleged unambiguous cap-per-claimant meaning of the statute's "plain language", the Sixth Circuit also rejected out-of-hand the cap-per-claim position officially adopted by Equal Employment Opportunity Commission (based on the same legislative history reviewed by Ms. Hudson and rejected by the appeals court) in an *amicus curiae* brief filed with the Eleventh Circuit in the case of *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860 (11th Cir. 1997). *See* 130 F.3d at 1201. App. A at 15a. Given the demonstrable ambiguity of the statutory language, however, the Court of Appeals should have paid due deference to the EEOC's views in this regard, as the Commission

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137 Cong. Rec. H 9527 (daily ed. Nov. 11, 1991) (emphasis added). More to the point, this analysis observes that under the damages caps: (a) an individual victim may well "have different independent *causes of action*" arising "out of the same or different factual situations;" and (b) such a complaining party who suffered discrimination on more than a single unlawful basis — *e.g.*, sex and retaliation for having complained of sex discrimination (as in the instant case) — would be entitled under the new provision to recover damages on each of the "independent causes of action." *Id.*

10. Oddly enough, the Court of Appeals also sought to deflect the forgoing legislative history supporting the proposition that caps are linked to claims not claimants by referring to a section-by-section analysis prepared by the Bush Administration that was submitted following the President's veto of an earlier version of what would ultimately become the Civil Rights Act of 1991. *See* 130 F.3d at 1200. App. A at 13a. However, these comments were on March 12, 1991, and they concern a different bill from the one ultimately enacted by Congress and signed into law by the President. Thus, the comments cited by the Circuit are not a part of the legislative history of the Civil Rights Act of 1991. Moreover, these comments reflect the views of the President, not the Congress, and are thus not a part of the legislative history of the 1991 Act in any case.

is the primary agency charged by Congress to interpret and enforce Title VII of the Civil Rights Act, as amended:

> [I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, *the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference. See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761, 99 S. Ct. 2066, 2074, 60 L. Ed. 2d 609 (1979). The reasonableness of the EEOC's interpretation [of the meaning of the term there in dispute] in its statutory context is more than amply supported by the legislative history of the [provision of Title VII containing the disputed term], the purpose of those provisions, and the language of other sections of the Act. . . . Deference is therefore appropriate.

Equal Employment Opportunity Commission v. Commercial Office Products Co., 486 U.S. 107, 115-16 (1988). *See also General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

Finally, the Sixth Circuit's single-cap holding necessarily requires a conclusion that Congress intended to allow employers who commit serial acts of discrimination on different bases to do so with impunity once they have reached the damage "cap" in terms of injuries inflicted. Indeed, such a construction of the damage limitations in § 1981a would encourage just the sort of retaliation which the jury found was visited upon Ms. Hudson: after she complained of discrimination, her employer embarked on a new and more intense course of retaliation; and after she continued to litigate her sex discrimination and retaliation claims, her employer turned up the heat on the discrimination and reprisal campaigns, which ultimately forced her from her job — leaving her with no income to support her effort to prosecute her claims. As the purpose of Title VII is to remedy the

effects of past discrimination and to outlaw future discrimination,[11] Congress simply could not have intended to allow an employer to "buy" a license to retaliate (and then to discriminate and retaliate further and drive a the victim from its employ) by satisfying a single damage "cap."

The Court of Appeals' failure to credit the expert views of the EEOC in its effort to uncover the Congress' intent with regard to the subsection 1981a limits on damages, along with its complete disregard of the actual legislative history in this quest, strongly suggests that this Court should grant the instant petition. Further, the illogic of the results obtained under the single cap holding of the Sixth Circuit, and their inconsistency with the acknowledged broad remedial and reformist purposes of Title VII itself and the amendments to it secured by the 1991 Civil Rights Act, makes all the stronger the suggestion that this petition should be granted.

III.

THE LIMITATIONS ON THE AWARD OF ATTORNEYS' FEES TO SUCCESSFUL TITLE VII PLAINTIFFS ALLOWED BY THE SIXTH CIRCUIT PLACE PLAINTIFF-EMPLOYEES AT A DISTINCT LITIGATIVE DISADVANTAGE AS COMPARED TO DEFENDANT-EMPLOYERS AND OTHERWISE UNDERCUT THE PURPOSE AND INTENT OF THE STATUTORY FEE AWARD PROVISION OF TITLE VII.

The Court of Appeals upheld a series of rulings by the trial court which effectively deprived Ms. Hudson's counsel of fair and reasonable compensation for the legal services rendered to their client in this successful litigation. If allowed to stand, the Sixth Circuit's

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11. "[T]he basic purpose of [42 U.S.C. § 2000e-16]: the rooting out of every vestige of employment discrimination within the federal government." *Hackley v. Roudebush*, 520 F.2d 108, 136 (D.C. Cir. 1975).

holdings in this regard will place plaintiff-employees at a clear disadvantage as compared to defendant-employers — particularly large employers — when it comes to litigating job discrimination claims, and will thereby undercut the intent of the fee-shifting provision of Title VII and those contained in other civil rights laws.[12] In this regard, the Court of Appeals: (1) limited the billing rate to be used for Ms. Hudson's lead counsel — who, like all of the lawyers who litigated this case on behalf of the government, was from Washington, D.C. — to local rates (*i.e.*, to an amount that the trial judge had concluded was the top rate for employment discrimination work in Knoxville, Tennessee ($150 per hour), the locale of the litigation and the underlying events); (2) affirmed the trial court's refusal to award Ms. Hudson attorneys' fees for any post-trial work in the case, despite the fact that such post-trial legal services resulted in plaintiff obtained substantial relief in the form of an award of back pay (which, with pre-judgment interest, came to over $175,000); (3) affirmed the trial court's refusal to fully compensate Ms. Hudson for the services during trial of the local counsel who assisted her lead counsel, although the defense table had four Department of Justice attorneys participating in representing the government throughout the trial (while Ms. Hudson had just her lead counsel and her local counsel who served as the single "second chair").[13]

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12. While this case specifically involves the fee-shifting provision of Title VII, 42 U.S.C. § 2000e-5(k), the limitations sanctioned by the Court of Appeals here will certainly be of equal applicability to the other fee-shifting provisions in the employment discrimination field, including, *inter alia*: the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988; the Age Discrimination in Employment Act's fee award provision, 29 U.S.C. § 216(b) through § 626(b); the Rehabilitation Act of 1973's fee award provision, 29 U.S.C. § 791; the Americans With Disabilities Act of 1990 fee award provision, 42 U.S.C. § 12205.

13. In addition to these abuses of the provision for an award of "reasonable" fees to a prevailing plaintiff in Title VII litigation (42 U.S.C. § 2000e-5(k)), the Court of Appeals also let stand the district court's refusal to award a fees for the legal services of the local Knoxville lawyers who had initially represented Ms. Hudson on the grounds that they had worked only on the

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The Court of Appeals affirmed the trial court denial of an attorneys' fee award for all post-trial work, notwithstanding the fact that the post-trial legal work obtained for Ms. Hudson substantial relief in the form of over $175,000 in back pay (with pre-judgment interest). The case law clearly establishes that where "the plaintiff's claims for relief . . . involve a common core of facts or [are] based on related legal theories," and the plaintiff prevails on some claims and theories, but not all of them, plaintiff's attorneys in such circumstances "should recover a fully compensatory fee" which "normally encompassing all hours reasonably expended on the litigation," and that such an award should not be "reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart,* 461 U.S. 424 (1983). Thus, although her counsel's post-trial efforts were not completely successful, the fact that such efforts did result directly in Ms. Hudson receiving a large award of back pay, coupled with the massive jury victory at trial, required that the post-trial legal services be compensated in the fee award. Where, as here, such compensation is denied completely, it simply cannot be said that a reasonable fee was awarded pursuant to 42 U.S.C. § 2000e-5(k).

Likewise, under the circumstance existing in this case, by denying Ms. Hudson an award of attorneys' fees for her lead counsels' services at their usual and customary billing rates, the lower courts

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portions of this consolidated law suit on which Ms. Hudson had not prevailed, *i.e.*, the pre-1991 Act Title VII claims, the Equal Pay Act claim and the Privacy Act claims. Given that the efforts of these early advocates saved Ms. Hudson's employment situation altogether in 1991 and preserved all her claims — including those on which she ultimately prevailed in the jury trial in 1994, it is hard to justify the gross exclusion of their services from the fees awarded. This is particularly so given that this Court has held that in considering a fee award to a prevailing plaintiff in a Title VII case, the fee should not be reduced because the plaintiff did not prevail on every ground or theory: "[w]here a plaintiff has obtained excellent results, his [or her] attorney should recover fully . . . " *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

in effect denied her an award of reasonable attorneys' fees in contravention of § 2000e-5(k)'s requirements.[14] While this case arose and was tried in Knoxville, a small city in eastern Tennessee, it involved some fairly cutting-edge applications of a new civil rights law (the 1991 Act) and sophisticated, indeed, often arcane, facts concerning federal, Department of Justice, and U.S. Attorney's office employment rules and practices. As such, it attracted Washington-based counsel, for both the government and, later, the plaintiff. If fee awards in such circumstances are permitted to rest on local billing rates, large and powerful employers — and here we have arguably the largest and most powerful — will always be able to trump the legal talent available to those among their employees who seek to vindicate their civil rights under a national law.

If the fee award provision of Title VII is to level the playing field between the litigants, then in circumstances such as those here, the lower courts cannot be permitted, under the guise of the exercise of ordinarily acceptable discretion, to unfairly limit fees to those set by reference to billing rates used around the courthouse in which trial occurs or the locale in which the causes of action arises. Even the Sixth Circuit, in another context, recognized the importance of fashioning a broad equitable remedy were invidious discrimination is found to have occurred, when it noted:

> Upon a finding of invidious discrimination in violation of Title VII, a district court has "wide discretion" with regard to imposing equitable remedies so as "to fashion the most complete relief possible" designed to "make the victims of unlawful discrimination whole." *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (quoting 118 Cong. Rec. 7168 (1972)). Consequently, an appellate

14. In affirming the trial court's use of a Knoxville rate, the appeals court recognized that the usual and customary billing rates of petitioner's lead counsel were the norm for their own locale — Washington, D.C. — for comparably experienced counsel. *See* 130 F.3d at 1208. App. A at 31a.

> court reviews a lower court's imposition of equitable remedies in a Title VII case for abuse of discretion. *Id.* at 424. The *Albemarle Paper* Court stressed, however, that a district court abuses its discretion if it loses sight of the two "large objectives of the Act": (1) "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees," and (2) to make whole the victims of unlawful employment discrimination. *Id.* at 417-18.

Shore v. Federal Express Corp., 42 F.3d 373, 377-78 (6th Cir. 1994).

Under the above-outlined circumstance, by fixing the fee award to Ms. Hudson for the legal services performed by her Washington, D.C.-based lead counsel at a Knoxville billing rate,[15] the lower courts abuse their discretion by both failing to make the victim of unlawful employment discrimination whole and by in effect resurrecting a barrier that deprives disadvantaged employees of their rights — namely, the economic disparity between the individual employee and her employer. Here, the Sixth Circuit has lost sight of the two "large objectives of the Act" and only this Court can put things right.

In a similar vein, the lower courts' slashing the fee award to Ms. Hudson for the legal services performed by the local Knoxville lawyer who second-chaired the trial by 25 percent is nothing but an abuse of discretion raising the same implications as the use of a Knoxville billing rate in fixing the fee award for her lead counsel's services. Not only did this act prevent Ms. Hudson as a victim of unlawful discrimination on-the-job from being made whole, but it affirmed

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15. In fact, on the record submitted in support of awarding of attorneys' fees, Ms. Hudson challenged before the Court of Appeals the $150 per hour billing rate used by the trial court to set the fee award for legal services rendered by her lead counsel as not reflective of the usual and customary rates in Knoxville, Tennessee for such experienced litigators as her lead counsel.

the advantage in litigation of her rich and powerful employer — who had not just two lawyers at counsel table at trial, but four. Again, it seems that only this Court can level the playing field.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED DECEMBER 4, 1997

130 F.3d 1193, Hudson v. Reno, (C.A.6 (Tenn.) 1997)

130 F.3d 1193

75 Fair Empl.Prac.Cas. (BNA) 1011,
72 Empl. Prac. Dec. P 45,097

Marilyn L. HUDSON, Plaintiff-Appellant,

v.

Jane RENO, Attorney General of the United States, and United States Department of Justice, Defendants-Appellees.

No. 96-5232.
United States Court of Appeals,
Sixth Circuit.
Argued Aug. 8, 1997.
Decided Dec. 4, 1997.

* * *

Before: KRUPANSKY and SUHRHEINRICH, Circuit Judges; ROSEN, District Judge.*

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

OPINION

ROSEN, District Judge.

Plaintiff-Appellant Marilyn L. Hudson appeals several rulings of the United States District Court for the Eastern District of Tennessee in her Title VII sex discrimination action. For the reasons stated herein, we affirm.

I. INTRODUCTION

Plaintiff-Appellant Marilyn Hudson, a former Assistant United States Attorney ("AUSA") brought this action in the District Court alleging that her superiors in the United States Attorney's office in the Eastern District of Tennessee (1) engaged in sex discrimination and retaliation against her in her employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* and the Equal Pay Act, 29 U.S.C. § 206(d), and (2) violated her rights under the Privacy Act, 5 U.S.C. § 552a. The Privacy Act, Equal Pay Act and pre-November 20, 1991 Title VII claims[1] were tried to the court, while a jury decided the post-November 20, 1991 Title VII claims.

The District Court found in favor of the Defendants on the Privacy Act, Equal Pay Act and pre-1991 Title VII claims. With respect to Hudson's post-November 20, 1991 claims, the jury found Defendants liable for sex discrimination, retaliation and constructive discharge and awarded Hudson $250,000 in compensatory damages for sex discrimination; $500,000 in compensatory damages for retaliation; and $750,000 in

1. November 21, 1991 is the date on which the Civil Rights Act of 1991, 42 U.S.C. § 1981a, *et seq.* became effective. The 1991 Act amended Title VII to provide for jury trials on sex discrimination and retaliation claims.

compensatory damages arising from the constructive discharge, for a total award of $1.5 million.The District Court, however, capped all of these damages at $300,000 pursuant to the damages caps in 42 U.S.C. § 1981a. The court also determined that reinstatement was not a viable option, but refused to award Plaintiff front pay, finding that Hudson had immediately gone into private practice after leaving the U.S. Attorney's office and that there was no financial detriment as a result of her change in employment. Thereafter, the court awarded Hudson $430,752.28 in attorney fees and costs.

Hudson now appeals the District Court's rulings with respect to the compensatory damages cap; the refusal to award her front pay; her Privacy Act claim; and the attorneys' fee award.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Marilyn Hudson was hired as an AUSA on March 7, 1983 by John W. Gill, Jr., who was, at the time, the United States Attorney for the Eastern District of Tennessee. In 1986 and 1987, Gill rated Hudson's work "excellent", and in 1988, he rated her "outstanding." Gill subsequently promoted Hudson to the position of Chief of the Financial Litigation Unit in February 1989, and then, in November 1989, he promoted her to Chief of the Civil Division. During this same time period, Gill also promoted James R. Dedrick, who was hired as an AUSA the same time as Plaintiff, to First Assistant U.S. Attorney, the second-in-command position.

Between February 1989 and April 1990, Gill rated Hudson's supervisory performance as "outstanding". Thereafter, however, Gill became dissatisfied with Plaintiff's performance. Specifically, he identified several managerial and personnel problems, including: failing to complete personnel paperwork in a timely fashion,

despite repeated requests; failing to complete her budgetary plan diligently; failing to comply with the Office's plan for purging old files, including falsely certifying that the Civil Division was in compliance; and shortcomings in her management of staff and distribution of work.

In January 1991, Gill recommended three of his male supervisors to the Executive Office for the United States Attorneys ("EOUSA") for salary increases. However, he declined to recommend Plaintiff, a female, and one other male AUSA because of their poor work performances. At this time, Gill and Dedrick also placed Plaintiff on a 90-day improvement plan designed to let her correct the deficiencies in her job performance. During this 90-day period, however, Ms. Hudson's performance did not improve.

In May 1991, Dedrick, with Gill's approval, gave Plaintiff a negative performance evaluation, rating her "minimally satisfactory" for the period April 1990 to April 1991.

On May 31, 1991, Hudson initiated an equal opportunity ("EEO") administrative complaint within the Department of Justice, charging that Dedrick and Gill had engaged in sex discrimination in violation of Title VII, and later, when she learned of Gill's refusal to raise her salary, she added an Equal Pay charge.

Unaware of Hudson's EEO complaint, on June 4, 1991, Gill and Dedrick demoted her to a line AUSA criminal position. However, this demotion did not affect Hudson's salary or regular interval pay increases. After Hudson's demotion, her former position as Civil Chief was abolished. A Criminal Chief position was subsequently created, and this position was given to Steve Clark, a male.

In the ensuing months, Hudson lied to Steve Clark about her leave status, and she was openly critical of Gill and Dedrick within the office and to outside attorneys, including advising one attorney that his client should try to resolve a case that the DOJ was prosecuting after Gill left his post, stating that the new U.S. Attorney would likely resolve it on terms more favorable to the defendant. She repeatedly referred to Gill and Dedrick in derogatory and obscene terms and implied that she was going to retaliate against them.

Gill ultimately requested that EOUSA investigate Hudson's misconduct and the general situation in the U.S. Attorney's office in Knoxville. The Executive Director of the EOUSA, Laurence McWhorter, sent EOUSA's Special Counsel, former U.S. Attorney John Volz, to investigate. Volz interviewed approximately 30 people about Hudson's alleged misconduct, and after finishing those interviews, Volz interviewed Hudson.

Eventually, Gill requested that the EOUSA terminate Hudson. On November 20, 1991, after receiving Gill's request, McWhorter wrote Hudson informing her that he intended to seek her termination based on the charges of misconduct made by Gill and Dedrick which Volz had investigated. McWhorter also informed Hudson that, prior to making a recommendation to the Deputy Attorney General, she would be given an opportunity to respond to the charges against her and her reply would be taken into consideration before further action was taken. Pending review of her conduct, Plaintiff was placed on non-duty status at full pay.

Shortly thereafter, Jerry Cunningham replaced John Gill as the U.S. Attorney for the Eastern District of Tennessee.

Appendix A

On December 11, 1991, Hudson filed an action in the district court alleging sex discrimination, retaliation and violations of the Privacy Act. In this action, Plaintiff sought, and was granted, a temporary restraining order ("TRO") enjoining DOJ from terminating her employment pending a preliminary injunction hearing. The District Court indefinitely continued the TRO. The Department of Justice successfully appealed the TRO decision to this Court, but 12 days before the District Court dissolved the TRO and ordered a preliminary injunction hearing without delay, Hudson resigned.

Although the EOUSA had referred the misconduct charges to the DOJ's Office of Professional Responsibility, the DOJ abandoned its efforts to terminate Hudson at the request of the new U.S. Attorney, Jerry Cunningham. Thus, in February 1992, Plaintiff returned to work.

Upon assuming office, Cunningham replaced Dedrick with Guy Blackwell as First Assistant. Prior to leaving, Dedrick showed Blackwell and Cunningham a file he had been keeping which contained his personal notes regarding Hudson's misconduct. This file, which was kept in a locked drawer, was separately categorized as the "First Assistant's" file and it was not retrievable under Hudson's name.

Although Cunningham initially supported Hudson, on June 25, 1992, he sent Hudson a memorandum detailing numerous instances of what he considered to be misconduct on her part during his tenure, including unauthorized removal of, and access to documents; lack of truthfulness to her superiors; failure to perform work and abuse of sick leave; and unprofessional and disruptive conduct. On October 27, 1992, Hudson filed another Complaint, again alleging additional Title VII sex discrimination

and retaliation and Privacy Act claims, as well as an Equal Pay Act violation.[2]

In April 1993, allegations of misconduct before the grand jury resulted in Plaintiff's being suspended from appearing before the grand jury. Although an investigation by the Office of Professional Responsibility ("OPR") soon cleared her of any wrongdoing, she was not allowed to resume her grand jury work.

Cunningham eventually left office in May 1993, and was replaced on an interim basis by David Dake. In August 1993, Hudson learned that when Carl Kirkpatrick became the new permanent U.S. Attorney, James Dedrick would be transferring back as First Assistant.

Effective September 4, 1993, Hudson resigned, and in October 1993, she amended her Complaint to include a sex discrimination and retaliatory constructive discharge claim. Immediately thereafter, she went into private practice with Ailor, Andrews & Hudson, a small firm that she founded with two other lawyers.

III. ISSUES ON APPEAL

As indicated above, Hudson appeals the District Court's rulings concerning compensatory damages, front pay, her Privacy Act claim, and the award of attorneys' fees. Specifically, Hudson appeals:

> (1) the District Court's ruling that the damages that the jury awarded to her should be capped at $300,000 under 42 U.S.C. § 1981a(b)(3);

2. The December 11, 1991 and October 27, 1992 Complaints were consolidated.

(2) the decision not to award her reinstatement or front pay as a remedy for the post-November 21, 1991 Title VII violations found by the jury;

(3) the determination that Plaintiff failed to prove any violation of the Privacy Act, 5 U.S.C. § 552a; and

(4) the District Court's award of attorneys' fees based on a rate of $150.00 per hour and refusal to award fees for work that it deemed duplicative or time spent on issues on which Plaintiff did not prevail.

IV. ANALYSIS

A. STANDARD OF REVIEW

The District Court's construction of the damage caps in § 1981a is a question of statutory construction and, accordingly is subject to *de novo* review. *United States v. Spinelle,* 41 F.3d 1056, 1057 (6th Cir. 1994); *United States v. Brown,* 915 F.2d 219, 223 (6th Cir. 1990). The District Court's decision not to award reinstatement or front pay, however, is reviewable only for an abuse of discretion. *Rousch v. KFC National Management Co.,* 10 F.3d 392, 399 (6th Cir. 1993), *cert. denied,* 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994).

With respect to the Privacy Act, the District Court's legal construction is subject to *de novo* review, while its factual findings concerning the acts and motivations of Appellees are reviewed under the clearly erroneous standard of Fed. R. Civ. P. 52. *Cf. Johnston v. Horne,* 875 F.2d 1415, 1423 (9th Cir. 1989), *and Chapman v. NASA,* 736 F.2d 238, 242 (5th Cir.), *cert denied,* 469 U.S. 1038, 105 S.Ct. 517, 83 L.Ed.2d 406 (1984), *with*

Performance Unlimited v. Questar Publishers, Inc., 52 F.3d 1373, 1381 (6th Cir. 1995). Finally, the District Court's determination of a fee award is reviewed for an abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Wayne v. Village of Sebring*, 36 F.3d 517, 531-32 (6th Cir. 1994), *cert denied*, 514 U.S. 1127, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995).

B. THE DAMAGES CAPS UNDER § 1981a

As indicated, above, the jury awarded Plaintiff a total of $1.5 million: (1) $250,000 in compensatory damages for sex discrimination; (2) $500,000 in compensatory damages for retaliation; and (3) $750,000 in compensatory damages for constructive discharge. The District Court, however, capped these compensatory damages at $300,000 pursuant to 42 U.S.C. § 1981a. On appeal, Hudson contends that the $300,000 cap in § 1981a does not apply to her entire lawsuit, but rather, separately to each claim raised. Thus, she urges this Court to award her $850,000: the total $250,000 amount awarded by the jury for the sex discrimination, the maximum capped $300,000 for the retaliation, and the maximum capped $300,000 for the constructive discharge.

The genesis of this dispute is the language of Section 1981a itself, which provides, in pertinent part:

> (a)(1) In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e- 5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section. . . .

* * * * * *

> (b)(3) The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> > (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a (emphasis added).

The parties do not dispute the applicability of this provision, but rather, the scope of the limitations.[3] Specifically, the question presented here is whether the § 1981a caps apply on a "per claim" or "per lawsuit" basis. Although this is a question of first impression, it is purely a matter of statutory construction.

A "familiar canon of statutory construction is that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) (*emphasis* added). Moreover, "words will be interpreted as taking

3. It is undisputed that DOJ employs more than 500 employees and that Hudson was awarded compensatory damages for intentional sex discrimination, retaliation, and constructive discharge under Title VII.

their ordinary, contemporary, common meaning," *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979), so that "[i]n construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose." *Mills Music, Inc. v. Snyder,* 469 U.S. 153, 164, 105 S.Ct. 638, 645, 83 L.Ed.2d 556 (1985). Therefore, if the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced, *United States v. Ron Pair Entrs., Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989), because " 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there'." *Department of Defense v. FLRA,* 510 U.S. 487, 503, 114 S.Ct. 1006, 1016, 127 L.Ed.2d 325 (1994), (quoting *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)).

In relevant part, Section 1981a plainly States that "[i]n ***an action*** brought by a complaining party . . . the complaining party may recover compensatory and punitive damages," although "[t]he sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, ***for each complaining party*** . . . $300,000." (Emphasis added).

Under the plain language of the statute, the cap on compensatory damages applies to each complaining party in an "action". An "action" is simply a "lawsuit brought in court." Black's Law Dictionary at 18 (6th ed. 1991). Similarly, the Federal Rules of Civil Procedure use the term "action" or "civil action" to describe all claims for relief alleged in a single lawsuit. See Fed.R.Civ.P. 2 and 3. Put simply, the § 1981a caps apply to each

party in an action, not to each claim, and there is nothing in the language of the statute to indicate otherwise. The face of the statute is conclusive and this is the reading of it that the Court must apply. Indeed, district courts have uniformly reached this same conclusion. *Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F.Supp. 440, 455 (D.Or. 1997); *Flor v. O'Leary*, Civ. 93-1343 (D.N.Mex. 1995) (unpublished); *Rogerson v. Widnall*, Civ. 92-5038 (D.S.D. 1995) (unpublished); *Baker v. Dalton*, Civ. 92-1082 (S.D.Cal. 1994) (unpublished); *Reynolds v. CSX Transp.*, 1995 U.S. Dist. LEXIS 9853 at 3 (M.D.Fla. 1995) (unpublished), *affirmed in part on other grounds and reversed in part on other grounds*, 115 F.3d 860 (11th Cir. 1997).[4]

Apparently realizing that the plain language of the statute weighs heavily against her argument, Plaintiff turns to the legislative history. First, she contends that the phrase "for each complaining party" was added as a last minute amendment in order to make it clear that the damage caps did not limit the damages available to individual plaintiffs when several of them joined in one civil action, relying on the following joint statement of the amendment's co-sponsors, Senators Hatch and Kennedy:

> The amount of damages that a victim can recover should not depend on whether that victim files her

4. As Defendants point out, this result is consistent with the uniform precedent that has construed § 1981a as establishing a single cap for all types of damages awarded, compensatory and punitive alike. *E.E.O.C. v. AIC Sec. Investigations Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Hennessy v. Penril Datacomm Networks*, Inc., 69 F.3d 1344, 1355 (7th cir. 1995); *Hogan v. Bangor and Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995); *Selgas v. American Airlines Inc.*, 858 F.Supp. 316, 326 (D.P.R. 1994), *affirmed in part, vacated in part*, 69 F.3d 1205 (1st Cir. 1995), *Emmel v. Coca-Cola Bottling Co. of Chicago, Inc.*, 904 F.Supp. 723, 739-41 (D.D.Ill.1995), affirmed, 95 F.3d 627 (7th Cir. 1996); *Solomon v. Godwin and Carlton, P.C.*, 898 F.Supp. 415, 416 (N.D. Tex.1995).

> own lawsuit or joins with other similarly situated victims in a single case. Rather, the amount of damages should depend on the injury the victim has suffered, subject to the caps. This amendment ensures that the remedy provided in the [bill] is available to each individual who has been subjected to abuse.

137 Cong.Rec. S 15471 (daily ed. Oct, 30, 1991). Thus, Hudson argues that the phrase "for each complaining party" should be read as insuring that the caps are applied on a per plaintiff basis, not on a per lawsuit basis when there may be several plaintiffs.

However, as Defendants point out, the section-by-section analysis of the bill that the Administration submitted after the President initially vetoed it plainly states that the caps should apply on a per lawsuit basis, regardless of how many discriminatory practices that a plaintiff alleges under § 1981a. 137 Cong.Rec. S 3025 (daily ed. March 12, 1991). Defendants also point out a statement from Senator Kennedy that suggests per lawsuit caps instead of per claim caps:

> The bill does not give victims an unlimited entitlement to damages . . . The amount of most compensatory and all punitive damages that each individual complaining party can obtain is limited to . . . $300,000 . . .

137 Cong.Rec. S15234 (daily ed. Oct. 25, 1991). Thus, the legislative history does not in fact support Hudson's "per claim" argument.

Hudson also relies upon the following passage of an interpretive memorandum submitted by seven Republican sponsors of the bill:

> [T]he following limitations also are placed on the damages available to each individual complaining party for each cause of action brought under section 1981[a] . . .

137 Cong.Rec. H 9527 (daily ed. Nov. 11, 1991).

Defendants, however, point out that the excerpted statement from the Republican sponsors is taken out of context and that in this statement the Senators were simply making it clear that the § 1981a caps did not apply to § 1981 claims so that an award for sex discrimination under § 1981a would not cap an award for race discrimination under § 1981. See 137 Cong.Rec. S 15484 (daily ed. Oct. 30, 1991).

Plaintiff further argues that a section-by-section analysis that Congressman Edwards, a sponsor of the House version, placed in the Congressional Record *after passage,* but before the President signed the bill into law supports her interpretation:

> [T]he limitations on damages awards in the legislation . . . apply to damages available to each individual complaining party for each cause of action brought under Section 1981a.

137 Cong.Rec. H 9527 (daily ed. Nov. 11, 1991).

However, with respect to Congressman Edwards' analysis, remarks made after the passage of a bill are not legislative history, and isolated remarks of a single member of Congress should be given little weight. *See, Landgraf v. USI Film Products,* 511 U.S. 244, 263 n.15, 114 S.Ct. 1483, 1495 n.15, 128 L.Ed.2d 299 (1994) ("[A] court would be well advised to take with a large grain of

salt floor debate and statements placed in the Congressional Record which purport to create an interpretation for the legislation that is before us"). Obviously, this is even more true when the statements are placed in the record after the bill had been passed and sent to the President.

Hudson also notes that the EEOC adopted a "per claim" cap position in an amicus brief that it filed in a case on appeal to the Eleventh Circuit — *Reynolds v. CSX Transportation,* No. 95-3364 (11th Cir.).[5] Thus, Plaintiff argues that the Court should defer to the EEOC's view. *E.E.O.C. v. Commercial Office Products Co.,* 486 U.S. 107, 115-16, 108 S.Ct. 1666, 1671-72, 100 L.Ed.2d 96 (1988). However, as Defendants note, such deference is only appropriate with respect to ambiguous language, *see Id.*; the EEOC's interpretation is entitled to no deference when its position is at odds with the plain language of the statute.

Plaintiff's final argument is that if the Court adopts a per lawsuit cap, it will simply encourage plaintiffs to file multiple lawsuits in order to circumvent the caps. But, as Defendants observe, the consolidation of actions under the Federal Rules of Civil Procedure and doctrines such as *res judicata* prevent such multiplicity. Moreover, Defendants argue that Hudson really only has one Title VII claim here based on the same core facts, and that to split her case into three different claims for the purposes of applying the damage caps ignores this reality.

The foregoing demonstrates the lack of merit in Plaintiff's "per claim" arguments. Simply stated, when a statute is plain on its face, courts should look no further than the statute itself. Therefore, the Court finds that the District Court correctly

5. Eleventh circuit has since decided this appeal, but the Court did not address the issue of damages caps under §1981a. *Reynolds v. CSX Transportation, Inc.,* 115 F.3d 860 (1997).

interpreted § 1981a when it capped Plaintiff's compensatory damages at $300,000.

C. REINSTATEMENT AND FRONT PAY

At trial, the District Court found no sex discrimination or retaliation through November 20, 1991, while for the time period thereafter, the jury awarded Plaintiff $1.5 million for sex discrimination, retaliation, and constructive discharge. Based on the jury's findings, Plaintiff requested five years of front pay, the time she expected it would take to build up her private practice. She did not request reinstatement.

The District Court declined to award Hudson either reinstatement or front pay. With respect to reinstatement, the court found that: (1) hostility existed between the parties; (2) Hudson immediately found other work; and (3) the DOJ was genuinely dissatisfied with Hudson's job performance. Accordingly, the District Court held that reinstatement was not appropriate.

With respect to front pay, the District Court found that: (1) Hudson had other job opportunities, namely the legal partnership that she joined immediately after leaving the DOJ; (2) Hudson is relatively young and has approximately 20 years, or more, of earning power left; and (3) there is no evidence in the record to suggest that she suffered any loss of income. Therefore, the District Court concluded that neither reinstatement nor an award of front pay was necessary to make Plaintiff whole as a consequence of her constructive discharge.

As indicated above, this Court reviews these conclusions for abuse of discretion.

Appendix A

On appeal, Hudson argues that: (1) the evidence adduced at trial does not support the District Court's conclusions regarding reinstatement and the District Court's conclusions are at odds with the jury's findings; and (2) with respect to front pay, the District Court's finding that other job opportunities were available to her is unsupported in the record; and (3) the District Court impermissibly put the burden on Plaintiff to demonstrate that she had suffered no financial loss as a result of her constructive discharge.

It is well-established that under Title VII a court may, as an equitable make-whole remedy, order that the plaintiff be reinstated to his or her previous position. *Cf. Henry v. Lennox Industries,* 768 F.2d 746, 752 (6th Cir. 1985) and *Farber v. Massillon Board of Education,* 917 F.2d 1391, 1396 (6th Cir. 1990) with *Roush v. KFC National Management Co.,* 10 F.3d 392, 398 (6th Cir. 1993), *cert. denied*, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994).

Although reinstatement is "the presumptively favored equitable remedy . . . [it] is not appropriate in every case, such as where the plaintiff has found other work, where reinstatement would require displacement of a non-culpable employee or where hostility would result." *Roush, supra,* 10 F.3d at 398 (citations omitted); *See also Shore v. Federal Express Corp.,* 777 F.2d 1155, 1159 (6th Cir. 1985) (reinstatement inappropriate where it results in displacement or where the hostility between the parties "precludes the possibility of a satisfactory employment relationship"). Moreover, an employer's genuine dissatisfaction with an employee's job performance is another factor which weighs against reinstatement. *McKnight v. General Motors Corp.,* 973 F.2d 1366, 1370 (7th Cir. 1992), *cert denied*, 507 U.S. 915, 113 S.Ct. 1270, 122 L.Ed.2d 665 (1993). Nevertheless,

> [t]he basis upon which reinstatements . . . may be denied must be more compelling than the personal preferences and distrusts which accompanied the initial discriminatory activity. "It is not enough that reinstatement might have disturbing consequences,' that it might revive old antagonisms, or that it could breed difficult working conditions' because relief is not restricted to that which will be pleasing and free of irritation." The district court, on such petition, is of course bound by the jury's decision of the issue of prior discrimination.
>
> *Farber, supra,* 917 F.2d at 1396.

Here, the District Court concluded that: (1) Hudson had found other work; (2) a non-culpable third party would be displaced; (3) hostility precluded a satisfactory employment relationship; and (4) the employer was genuinely dissatisfied with Hudson's job performance. The record indicates that Plaintiff found other work by starting her own legal practice. Moreover, the record clearly demonstrates that the working relationship between Hudson and her former DOJ colleagues had been destroyed by strong animosities and distrust on both sides. Finally, the record also indicates that the DOJ was legitimately dissatisfied with Hudson, based on numerous instances of misconduct. Thus, although Plaintiff correctly points out that there is no specific factual finding which suggests that a third-party would be displaced, we find that the District Court's decision not to award reinstatement is amply supported by the record and the relevant case law and is, therefore, not an abuse of discretion.

With respect to Plaintiff's appeal of the refusal of the District Court to award front pay, we find that this issue is moot in light

of our holding that the cap on compensatory damages set forth in Section 1981a of the 1991 Civil Rights Act applies to lawsuits as a whole and not merely to claims. We reach this decision because we find that front pay is an award of damages to compensate for "future pecuniary losses", and as such, falls within the statutory language of compensatory damages which is, in turn, subject to the statutory caps on damages set forth in 42 U.S.C. § 1981a(b)(3).

We begin by observing that prior to the enactment of the 1991 Civil Rights Act, many courts, including the Sixth Circuit,[6] routinely awarded "front pay" as an alternative to reinstatement in Title VII actions, under the powers and remedies provision of Section 706(g) of the Civil Rights Act of 1964 which provides, in relevant part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ***or any other equitable relief as the court deems appropriate.***

42 U.S.C. § 2000e-5(g). This is the authority cited by the District Court in deciding whether to award front pay in this case "to remedy the *post-1991 Act* violations of Title VII". [8/10/95 Findings of Fact and Conclusions of Law, pp. 3, 37-43 (emphasis added).]

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6. *See, e.g., Shore v. Federal Express Corp., supra; Suggs v. ServiceMster Educ. Food Management,* 72 F.3d 1228 (6th Cir. 1996.

However, as indicated above, the 1991 Civil Rights Act provides that "compensatory damages. . . ***for future pecuniary losses,*** emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, ***and*** other ***nonpecuniary losses"*** are subject to the statute's damages limitations. 42 U.S.C. § 1981a(b)(3). The 1991 Act only excludes from the Act's damages caps "back pay, interest on back pay, *or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964."*

The question then is whether "front pay" is "compensatory damages for *future pecuniary losses*" or whether it is "*any other type of relief authorized under section 706(g)*" i.e., "any other *equitable relief* that the court deems appropriate."

Congress did not define the phrase "future pecuniary losses" in § 1981a or in any other statute. Therefore, as we noted in construing the statute earlier, our responsibility is to give the phrase its "ordinary, contemporary, common meaning." *Perrin v. United States, supra,* 444 U.S. at 42, 100 S.Ct. at 314. According to Webster's Dictionary, these three words ["future pecuniary losses"] are defined as follows:

1. Future: existing or occurring at a later time;
2. Pecuniary: consisting of or measured in money;
3. Losses: an amount that is lost.

Webster's Ninth New Collegiate Dictionary, pp. 500, 806, 700 (1988).

Given the plain meaning of these three words, we must conclude that the term "future pecuniary losses" must be given its common, ordinary, meaning, i.e., an amount of money which

will be lost at a later time. We then turn to the legal definition and purpose of "front pay" to determine if it fits within the meaning of "future pecuniary losses."

"Front pay" is widely defined as the salary that an employee would have received had he or she not been subjected to unlawful discrimination of his employer, subject to the employee's mitigating his or her damages. *See, e.g., Shore v. Federal Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994). Thus, "front pay", by both its definition and purpose in the law, is a "future pecuniary loss" because it is a monetary award for the salary that the employee would have received but for the discrimination. The problem arises, however, because, as noted above, courts have awarded front pay as an alternative to reinstatement under § 706(g) of Title VII. But, "front pay" is not specifically "authorized" by § 706(g) and in the Sixth Circuit, we have treated front pay, in most contexts, as a legal, rather than an equitable, remedy by ruling that, although it is for the court to determine whether front pay is appropriate in lieu of reinstatement, the determination of the amount of any such award is a matter for the jury to decide. *See, e.g., Rousch v. KFC Nat. Mgmt. Co., supra* 10 F.3d at 398-400; *Suggs v. Service Master Educ. Food Management, supra.* See also, *Fite v. First Tennessee Production Credit Ass'n,* 861 F.2d 884, 893 (6th Cir. 1988).

Furthermore, we believe that not only must we give the phrase "future pecuniary losses" its ordinary meaning, but we must also give it substance and not render it meaningless. If the phrase "future pecuniary losses" were not construed to include front pay, the phrase would be rendered meaningless because the statute separately "defines" compensatory damages subject to the Act's damages caps as compensatory damages for "future pecuniary losses" and "nonpecuniary losses". See 42 U.S.C. § 1981a(b)(3). Further, if the term does not refer to front pay, it is hard to see

what it would refer to, as front pay has always been the heart of "future pecuniary losses" in discrimination suits.

Based upon the foregoing analysis, we conclude that front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a "future pecuniary loss" and is not authorized by the plain language of § 706(g) itself. And, because the jury verdict here exceeded $300,000 — the applicable compensatory damages limitation under the 1991 Act — the cap has been exhausted, leaving no room under the cap for any further award of front pay. Therefore, Hudson's argument that the District Court erred in refusing to award her any front pay is rendered moot.

D. THE PRIVACY ACT

1. Plaintiff's Claims at Trial and the District Court's Resolution of Them

At trial, Hudson alleged the following claims under the Privacy Act:

1. Defendants violated § 552a(e)(2) of the Privacy Act during the investigation into her conduct by Volz when he collected information about her by questioning others when such information could have allegedly been collected from Hudson herself.

2. Through his questioning, Volz spread false allegations of misconduct on Hudson's part to each of those people interviewed, thus violating the Privacy Act by releasing information about her to those who are not authorized to receive such information. Similarly, she also alleges that in speaking to Cunningham and others outside government about her, Dedrick released information

about her to those who were not authorized to receive such information, in violation of 5 U.S.C. § 552a(b).

3. Dedrick, Gill, Cunningham, and other employees of the U.S. Attorney's Office and the EOUSA violated the Privacy Act by establishing and maintaining a "secret," name-retrievable file about her and in using information in that file as a basis for personnel decisions concerning her.

4. The U.S. Attorney's Office violated § 552a(d) of the Privacy Act when it did not correct her 1990-91 performance rating until June 1992, although it was ordered changed in December 1991 as a result of the grievance decision. Hudson also alleged that Defendants refused to correct other information about her contained in her personnel file.

The District Court denied Hudson relief on each of these claims, and we find no error in the District Court's decision.

The Privacy Act of 1974 regulates the collection, maintenance, use, and dissemination of information concerning individuals. The Act attempts to strike a balance between the government's need to collect and maintain information and the privacy interests of the persons to whom such information pertains. *See, e.g., DePlanche v. Califano,* 549 F.Supp. 685, 695 (W.D.Mich. 1982).

Turning to Hudson's first Privacy Act claim in this action, that Defendants violated § 552a(e)(2) of the Privacy Act when Volz went to others to collect information about her before meeting with her personally, to maintain a claim under § 553a(e)(2), a plaintiff must establish the following elements:

(1) that defendant failed to elicit information about plaintiff "to the greatest extent practicable" from plaintiff;

(2) that the violation of the Act was intentional or willful; and

(3) that defendant's actions had an adverse impact on plaintiff.

See 5 U.S.C. §§ 552a(e)(2); 552a(g)(4); 552a(g)((1)(D) (*emphasis* added).

The OMB guidelines, which the statute authorizes and which were promulgated simultaneously with the Act, provide that when conducting an investigation into a particular person, third party sources may be contacted first when practical considerations, such as confirming or denying false statements, require this or when the information can only be obtained from third parties. *See, e.g.,* 40 Fed. Reg. 28,948, 28,961 ("Practical considerations . . . may dictate that a third party source . . . be used as a source of information in some cases . . . [I]t may well be that the kind of information needed can only be obtained from a third party"). The case law also recognizes the realities of conducting an investigation and identifies other "practical considerations." *See, Brune v. I.R.S.,* 861 F.2d 1284, 1287 (D.C. Cir. 1988) (where possibility exists that a federal employee who is the subject of an internal agency investigation will intimidate third-party witnesses, an agency investigator need not contact the subject employee before contacting others).

Here, the District Court found, based on evidence clearly established in the record, that Hudson was suspected of making

false statements and she was allegedly intimidating and threatening people and otherwise dividing the U.S. Attorney's office. (Joint Appendix, Letter from Gill to EOUSA, p. 255; Joint Appendix, District Court Opinion, fn. 28 and 29, p. 139). All of these practical considerations demonstrate that Volz did not violate the Privacy Act when he interviewed others before interviewing Hudson.

Plaintiff also claims that in interviewing witnesses, Volz spread rumors about her. The District Court found, however, that Volz only received information and conveyed only the facts and circumstances that were necessary for him to frame his questions. More importantly, the Privacy Act only prohibits the disclosure of information that has been retrieved from a system of records. *Wilborn v. Dept. of HHS,* 49 F.3d 597, 600 (9th Cir. 1995). The "spreading of rumors" is more closely akin to office gossip than to the disclosure of records protected by the Privacy Act.[7] *See Beaulieu v. U.S.A.*, 865 F.2d 1351, 1352 (1st Cir. 1989). Moreover, the District Court found that neither Volz nor the EOUSA intentionally or willfully violated Hudson's rights under the Privacy Act.[8] *Henson v. NASA,* 14 F.3d 1143, 1149 (6th Cir. 1994) (plaintiff must prove that the government's actions were intentional or willful); *Kostyu v. U.S.*, 742 F.Supp. 413, 416 (E.D.Mich. 1990) (culpability under the Privacy Act requires a showing of fault greater than gross negligence); *Moskiewicz v.*

7. To the extent that Volz was "spreading rumors" based on information in Dedrick's file, the Court concludes that this allegation still does not trigger the privacy Act since Dedrick's file is not covered by the Act, as discussed, *infra.*

8. Hudson argues that because the jury found discrimination and retaliation post-November 20, 1991, this somehow binds the District Court's fact-finding and legal conclusions regarding the Privacy Act. This argument has no legal significance because it was the District Court, not the jury, that was the fact-finder on the Privacy Act claims. Thus, the district Court is not bound by anything that the jury did on the post-November 20, 1991 Title VII claims.

Dept. of Agriculture, 791 F.2d 561, 563 (7th Cir. 1986); *Andrews v. Veterans Admin. of United States,* 838 F.2d 418, 425 (10th Cir.), *cert denied,* 488 U.S. 817, 109 S.Ct. 56, 102 L.Ed.2d 35 (1988) (conduct must be patently egregious and unlawful); *Albright v. United States,* 732 F.2d 181, 189 (D.C. Cir. 1984) (intentional or willful standard under the Privacy Act does not encompass all voluntary actions with might otherwise inadvertently contravene one of the Act's strictures). The District Court's finding on this issue, which is subject to a clearly erroneous standard of review, is fully supported by the record. (Joint Appendix, Volz Testimony, pp. 547-55). Therefore, it must stand.

Plaintiff next complains that Dedrick kept a "secret" file on her which contained false information in violation of the section of the Privacy Act governing the maintenance of, and access to, employee files. Specifically, she cites 5 U.S.C. § 552a(d)(1) which provides:

> **(d) Access to records.** — Each agency that maintains *a system of records* shall —
>
> > **(1)** upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence. . . .

(*Emphasis* added). Critical to Hudson's argument, therefore, is the proposition that Dedrick's personal notes were "a system of records" within the meaning of the statute.

Under the Privacy Act, a "system of records" is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Plainly, Dedrick's notes about Plaintiff's misconduct which were kept in a locked drawer and labeled the "First Assistant's" files do not fall within this definition. *See Smiertka v. United States Dep't of Treasury,* 447 F.Supp. 221, 228-29 (D.D.C. 1978), *vacated and remanded on other grounds*, 604 F.2d 698 (D.C.Cir. 1979) (plaintiff not entitled to daily reports prepared by an agency investigation because they were not accessible by the plaintiff's name or other personal identifier, but by the name of the agency investigator who prepared them); *Manuel v. Veterans Administration Hospital,* 857 F.2d 1112, 1119 (6th Cir. 1988), *cert denied*, 489 U.S. 1055, 109 S.Ct. 1317, 103 L.Ed.2d 586 (1989) (same). Accordingly, the Court will not disturb the District Court's conclusion.

Alternatively, Plaintiff argues that these notes should have been made part of a system of records because 5 U.S.C. § 552a(e)(5) states:

> **(e) Agency requirements.** — Each agency that maintains a system of records shall —
>
> **(5)** maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

The District Court, however, found that Dedrick's personal notes were not used to make any determination with respect to Plaintiff,[9] noting that Cunningham did not return Plaintiff to the position of Civil Chief because: (1) he only had one supervisory slot available; (2) he needed a Criminal Chief; and (3) the other staff did not respect Plaintiff. *See Johnston v. Horne*, 875 F.2d 1415, 1423 (9th Cir. 1989) (supervisor's notes about an employee not covered under Privacy Act unless plaintiff establishes causal link between the notes and adverse employment decisions); *Bowyer v. United States Dept. of Air Force*, 804 F.2d 428, 431-32 (7th Cir. 1986) (same); *Boyd v. Secretary of the Navy*, 709 F.2d 684, 686-87 (11th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984). Hudson has not cited us to anything in the record to demonstrate that the District Court's finding here is clearly erroneous. Therefore, this Court must affirm.[10]

Finally, Hudson contends that DOJ did not properly correct her 1990-91 performance evaluation and improperly disclosed it within the office. On the first point, the Privacy Act provides that an agency shall "maintain all records which are used . . . in making any determination about any individual with such accuracy,

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9. Therefore, Hudson's reliance on *Chapman v. NASA*, 682 F.2d 526, 528-30 (5th Cir.1982), is misplaced because in that case it was uncontrovedrted that the notes played a part in the plaintiff's discharge and that the notes were an ambush on the plaintiff who had been lulled by his positive performance reviews into thinking that his work was satisfactory.

10. Moreover, even if the file were subject to the Privacy Act, it was only disclosed to others namely Plaintiff's supervisors, on a "need to know" basis within DOJ. *See* 5 U.S.C. § 552a(b)(1) (bar on disclosure of records without written permission of individual does not apply where the officers and employees of the agency that maintains the record need to the record to perform their duties).

relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Here, the District Court found that DOJ made reasonable efforts to timely correct the evaluation and there is nothing in the record to suggest otherwise. On the second point, the District Court found that the evaluation was only disclosed to Sandy Dennis, who had typed it originally, for re-typing. Clearly, as the District Court found, this is within the necessary (need to know) disclosures that the Privacy Act exempts from liability. 5 U.S.C. § 552a(b)(1).

A final basis for affirming the District Court's decision with respect to Hudson's claims under the Privacy Act is her failure to show "actual damages," as required by the Act. 5 U.S.C. § 552a(g)(4). Hudson attempts to bootstrap her Title VII claims by arguing that the compensatory damages that the jury found on these issues evidence her damages under the Privacy Act. This argument is problematic for several reasons. First, the weight of authority suggests that actual damages under the Privacy Act do not include recovery for "mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327, 331 (11th Cir. 1982); *Pope v. Bond*, 641 F.Supp. 489, 501 (D.D.C. 1986); *DiMura v. FBI*, 823 F.Supp. 45, 48 (D.Mass. 1993).[11] Further, Hudson did not carry her burden

11. There is one case to the contrary which holds that emotional damages are recoverable under the Privacy Act, *Johnson v. Department of Treasury*, 700 F.2d 971 (5th Cir. 1983). However, as other courts have observed this case fails to recognize the bedrock principle that courts must strictly construe waivers of immunity in favor of the sovereign and not enlarge the waiver beyond what the language requires. *DiMura, supra*, at 48. As even the *Johnson* Court noted the term "actual damages" has no plain meaning or consistent legal interpretation, thus when it is being applied against the government it must be narrowly interpreted — here that requires finding that actual damages only mean out-of-pocket losses, not emotional distress.

of showing that the alleged violations of the Privacy Act *caused* her any damages. *See Molerio v. F.B.I.*, 749 F.2d 815, 826 (D.C.Cir. 1984).

Based upon the foregoing discussion, we find no error in the District Court's decision regarding Hudson's Privacy Act claims.

E. ATTORNEYS' FEES

1. *Fees of Wanda Sobieski and Herbert Moncier*

Hudson initiated this action by filing a petition for a TRO and preliminary injunction to prevent the DOJ from taking adverse employment action against her. At that time, Wanda Sobieski represented Plaintiff, until she withdrew and was replaced by Herbert Moncier because Sobieski witnessed a material event in the case.[12] The District Court granted the TRO and extended it indefinitely. On appeal, this Court dissolved the TRO and ordered the preliminary injunction hearing without delay. *Hudson, supra,* 3 F.3d at 975. However, 12 days before the scheduled hearing, Hudson resigned, claiming constructive discharge, and thus, the preliminary injunction issue became moot.

Post-trial, the District Court refused to award any fees to Sobieski and Moncier reasoning that: (1) for the purposes of their representation, Hudson was not a prevailing party because the preliminary relief, the TRO, that they obtained fell short of an unambiguous indication of probable success on the merits, especially in light of this Court's reversal, *Webster v. Sowders,* 846 F.2d 1032, 1036 (6th Cir. 1988); (2) ultimately, the claims

12. Apparently, Cunningham told Sobieski in January 1992 that he could no longer support Hudson due to pressure from EOUSA to remove her.

that Sobieski and Moncier worked on — the pre-November 20, 1991 claims — proved unsuccessful, and it is well-established that a plaintiff is not entitled to attorneys' fees based on interim orders (TROs) that may have in fact benefitted the plaintiff when he or she loses the case on the underlying merits of the claim, *NAACP v. Detroit Branch v. D.P.O.A.*, 46 F.3d 528, 530 (6th Cir. 1995); and (3) Sobieski requested fees that arose after her representation ceased and for matters that appeared to be related to her testimony at trial — neither of which are compensable. The District Court's reasoning here is consistent with the case law and the facts of this case and is, therefore, not an abuse of discretion.

2. Hourly Rates for Kator, Scott & Heller and Swick & Shapiro

In her Petition for attorneys' fees, Hudson also sought compensation for the work of her lead counsel in this matter, Kator, Scott & Heller and Swick & Shapiro, with David Shapiro being her primary attorney.[13] During this case, Shapiro's and his partners' usual and customary billing rates were between $225 and $300 per hour, consistent with other lawyers of similar backgrounds in Washington, D.C.

The District Court, however, found that $150 per hour was a reasonable rate for these lawyers. In reaching that conclusion, the court canvassed the record as to the billing rate for attorneys in

13. Shapiro tried the case for Plaintiff and has been her lead counsel in this matter since mid-1992. As of March 1, 1993, he has worked at the Washington D.C. law firm of Swick & Shapiro, P.C., and has been assisted in representing Hudson there through his law partner Richard Swick and an associate. Prior to this time, he was a partner in the Washington D.C. law firm of Kator, Scott & Heller, Chartered, and there he was assisted in representing Plaintiff by two partners, Joseph Scott and Douglas Huron and two associates.

Knoxville, Tennessee, noting that during the relevant time period the time the billing rate for other lawyers on this case, specifically Hudson's law partner, James Andrews, and Attorneys Sobieski and Moncier, ranged from $125-$135, $150-$250, and $125-$135 per hour, respectively. Referring to Sobieski's rates, because of her extensive Title VII background, the District Court concluded that a reasonable fee for the Washington, D.C. lawyers was $150 per hour, which is slightly higher than Sobieski's $135 per hour rate.

On appeal, Hudson challenges the $150 per hour rate, contending that the Court should award her the rates normally charged by her Washington, D.C. lawyers because of their special expertise which was called upon in this matter.

It is well-established that "[a] district court has broad discretion to determine what constitutes a reasonable hourly rate for an attorney." *Wayne v. Village of Sebring*, 36 F.3d 517, 531-32 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995). In particular, this Court has made clear that "it is not an abuse of discretion for a court to apply local market rates." *Id.* Thus, "a renowned lawyer who customarily receives $250 an hour in a field in which competent and experienced lawyers in the region normally receive $85 an hour should be compensated at the lower rate." *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986), *cert. denied*, 482 U.S. 914, 107 S.Ct. 3186, 96 L.Ed.2d 674 (1987). The District Court's reasoning here is well-supported by the relevant case law and the facts of this case, therefore, this Court finds no abuse of discretion.[14]

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14. Plaintiff argues that only Washington, D.C. lawyers should have litigated this case because it involved the DOJ and because the DOJ was using lawyers out of its Washington, D.C. office. This argument misses the point. Title VII cases require no Department of Justice expertise, and the DOJ's choice of counsel is simply not relevant to any fee award for a plaintiff.

3. *Reduction of Hours*

In making the fee award, the District Court also reduced the number of hours that Plaintiff petitioned for in two instances. Hudson challenges each of these reductions.

First, the District Court refused to award fees for post-trial work that related to the preparation of Hudson's proposed findings of fact and conclusions of law in the non-jury portion of the trial in which she did not prevail. It is beyond peradventure that a District Court may exclude time for work on a claim on which the plaintiff did not prevail.[15] *See Hensley, supra,* 461 U.S. at 436-37, 103 S.Ct. at 1941 ("[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success"); *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) ("if 'a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount' "). Thus, the District Court must be affirmed here.

Second, the District Court reduced the fees of Andrews by 25% to account for duplication of effort in trial, trial preparation, and the pre-trial conference. Hudson argues that this reduction was improper because the DOJ was represented in the courtroom by four lawyers, while Andrews was Shapiro's only assistant at trial. Again, this argument is irrelevant to the District Court's determination that some of Andrews' time was duplicative. It is

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15. We note that the District Court expressly awarded fees for all time spent at trial, regardless whether Plaintiff prevailed on a particular claim, due to the interrelated nature of many of her claims and the necessity of fleshing out all of the relevant circumstances and events, regardless of the pre and post November 20, 1991 distinction.

well-established that "[t]he lower court's determination that an indefinite number of hours claimed by Plaintiffs are excessive or duplicative is a finding of fact, which is to be affirmed unless clearly erroneous." *Wayne, supra,* 36 F.3d at 532. Therefore, the district court may take such duplication into account by making a simple across-the-board reduction by a certain percentage. *See Coulter, supra,* 805 F.2d at 152. Hudson has offered the Court no relevant reason why the District Court's findings and conclusions here should be disturbed, and therefore, the Court finds that the District Court must be affirmed.

V. CONCLUSION

For all of the reasons stated above in this Opinion, the District Court's decisions on all of the issues are AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, KNOXVILLE DIVISION, PARTIALLY GRANTING AND PARTIALLY DENYING PLAINTIFF'S MOTION FOR AWARD OF COSTS AND ATTORNEYS' FEES FILED JANUARY 16, 1996

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

KNOXVILLE DIVISION

Civ. No. 3-92-737

MARILYN L. HUDSON,

Plaintiff,

v.

JANET RENO, et al.,

Defendants.

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PLAINTIFF'S MOTION FOR AWARD OF COSTS AND ATTORNEYS' FEES

Before the court is the motion for costs and attorneys' fees of plaintiff Marilyn L. Hudson. Plaintiff brought this action against her former employers, the United States Attorney General and the Department of Justice, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-16 *et seq.* ("Title VII"), the Equal

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Pay Act, as amended by the Fair Labor Standard Amendments of 1974, 29 U.S.C. § 206(d), and the Privacy Act, 5 U.S.C. § 552a. Plaintiff alleged that she (1) had been discriminated against in her employment on the basis of her sex; (2) was retaliated against for complaining about the discrimination; and (3) had been constructively discharged from her employment. Plaintiff also contended that defendants violated the requirements of the Privacy Act during an investigation of her alleged on-the-job misconduct.

Plaintiff's Title VII claims occurring after the enactment of the Civil Rights Act of 1991, i.e., after November 20, 1991, were tried to a jury.[1] The jury returned a verdict in favor of plaintiff and awarded her $250,000 in compensatory damages for the sex discrimination, $500,000 in compensatory damages for the retaliation, and $750,000 in compensatory damage" for the constructive discharge. The court reduced the total amount of the jury award from $1.5 million to $300,000, pursuant to the statutory "cap" contained in the Civil Rights Act of 1991. In addition to the compensatory damages award, in entering judgment on the jury verdict, the court ordered defendants to provide plaintiff with full back pay and prejudgment interest thereon.[2] The total amount awarded plaintiff for compensatory damages, back pay, and prejudgment interest was $478,143,74.[3]

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1. Because the Civil Right. Act of 1991 provides for a jury trial for events occurring after November 20, 1991, the trial of this case involved a jury determination of certain claim and a court determination of other claims. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

2. Back pay was awarded from September 4, 1993, the date of plaintiff's constructive discharge, through the date of the judgment. The back pay amount totaled $164,330.96, and the prejudgment interest totaled $13,812.78.

3. The court concluded that neither reinstatement nor an award of front pay was necessary in order to make plaintiff whole as a consequence of her constructive discharge.

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Additionally, defendants were ordered: (1) to credit and/or restore plaintiff's annual leave and sick leave that would have accrued from the date of her constructive discharge through the date of payment of all back pay due; (2) to pay her for all such restored annual and sick leave at the salary level she would have had during that time; and (3) to correct all records, including plaintiff's official personnel folder, to reflect the relief ordered by the court. Defendants were permanently enjoined from discriminating or retaliating against plaintiff in the future, and plaintiff was awarded the costs of this action and reasonable attorney's fees, pursuant to 42 U.S.C. § 2000e-5(k), 29 U.S.C. § 216(b) and 5 U.S.C. § 552a(g)(4)(B). The court, acting without a jury, ruled in favor of the defendants on the Title VII claims arising out of events that occurred prior to November 21, 1991, and on the Privacy Act and Equal Pay Act claims.

Plaintiff has submitted documentation as to the amount of the attorneys' fee and costs which she contends were reasonably incurred in this action. Defendants have filed a response to plaintiff's motion in which they generally object to the award of any fees and costs to plaintiff and specifically object to certain items. Plaintiff has filed a reply to defendants' response. For the reasons set forth below, plaintiff's motion is PARTIALLY GRANTED and PARTIALLY DENIED.

BACKGROUND

Plaintiff Marilyn Hudson was hired by John Gill, then U.S. Attorney for the Eastern District of Tennessee, in 1983 as an Assistant United States Attorney ("AUSA"). In February 1989, Gill promoted her to a supervisory position, and, in November 1989, he promoted her to the position of Chief of the Civil Division of the U.S. Attorney's office for the Eastern District

of Tennessee. At approximately the same time that Hudson became the Chief of the Civil Division,

Gill appointed James R. Dedrick as First Assistant U.S. Attorney for the office, the second-in-command position. Gill and Dedrick became dissatisfied with Hudson's performance as Civil Chief, and in January 1991, plaintiff did not receive a salary increase that certain other supervisors received.[4] Plaintiff was scheduled to receive an evaluation in January 1991, but Gill and Dedrick decided, instead, to place her on a 90-day improvement plan. During the 90-day period, Gill and Dedrick felt that plaintiff's performance did not improve. Therefore, in May 1991, Dedrick gave her a negative performance evaluation.

Thereafter, Hudson initiated the equal employment opportunity ("EEO") administrative complaint process alleging, inter alia, that Dedrick, with Gill's approval, had discriminated against her because of her sex by giving her a negative performance rating. She later added an Equal Pay Act claim to her EEO charge. Additionally, Hudson filed an administrative grievance with EOUSA in regard to her performance evaluation rating. Through the grievance process, the negative rating was eventually changed to an overall rating of "excellent" because of a technical deficiency in the original evaluation process.

On June 4, 1991, Hudson was demoted by Gill from the Civil Chief position and put into a line AUSA position to do criminal prosecution work without a reduction in grade-level or

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4. Gill forwarded the necessary paper work for Dedrick, Curter Collier, and Mike Winck, all males, to obtain salary increases but did not forward such paper work for plaintiff and Bob Simpson because of their poor work performances, according to Gill. Consequently, only Dedrick, Collier, and Winck received pay raises.

salary. According to Gill and Dedrick, the demotion was based on Hudson's reaction to the negative rating and her lack of response to the improvement plan. After Hudson's demotion, the supervisory position designated as Civil Chief was abolished, and a Criminal Division Chief position was created.

In the months following the demotion, Gill received reports that Hudson had openly criticized him and Dedrick and was making statements that could be construed as intending to strike back at the management of the office. Therefore, he requested that the Executive Office for United States Attorneys ("EOUSA") conduct an inquiry. Accordingly, Laurence McWhorter, Executive Director of ("EOUSA"), sent EOUSA's Special Counsel, John Volz, to investigate the situation. Volz conducted interviews and prepared a report on his findings, which was ultimately transmitted back to McWhorter.

In October 1991, several more allegations of misconduct by plaintiff were reported to Gill. After these allegations arose, and, in view of the other instances of alleged misconduct, Gill forwarded a request to EOUSA that plaintiff be terminated. After receiving Gill's request, McWhorter issued a letter to plaintiff informing her that he intended to seek the termination of her employment based on the charges of misconduct and the investigation of those charges by his Volz. McWhorter's letter also informed plaintiff that, pending review of her conduct, she would be placed on non-duty status at full pay.

On November 20, 1991, Gill delivered McWhorter's letter to Hudson shortly before his departure from office and the swearing in of his replacement. Hudson remained suspended from November 20, 1991, until February 1992. At the request of Jerry Cunningham, the U.S. Attorney who replaced Gill, the

government rescinded Hudson's suspension and abandoned the effort to terminate her employment. Cunningham replaced Dedrick with Guy Blackwell as First Assistant, and, shortly thereafter, Dedrick transferred to another district.

Despite Cunningham's initial support of Hudson, on June 25, 1992, he issued her a letter describing various acts of alleged misconduct and warning her that any other incidents of misconduct could lead to further disciplinary action. Allegations of misconduct before the grand jury resulted in Hudson's being suspended from appearing before the grand jury in April 1993. Although an investigation by the Office of Professional Responsibility ("OPR") soon cleared her of any wrongdoing, she was not allowed to resume her grand jury work.

Cunningham left the U.S. Attorney's Office in May 1993, and David Dake, a friend of Dedrick, became the interim U.S. Attorney. In August 1993, Hudson learned that Dedrick would be transferred back to the Eastern District of Tennessee to serve as First Assistant as soon as Carl Kirkpatrick was sworn in as U.S. Attorney. Hudson resigned effective September 4, 1993, and filed an amended complaint alleging that she had been constructively discharged based on Dedrick's imminent return and Dake's continued allegations of misconduct.

At trial, plaintiff contended that the decision to deny her a pay raise, the negative rating for the April 1990 to April 1991 performance period while she was Civil Chief, and her demotion as Civil Chief were the result of sex discrimination. The retaliation claim was based on her contention that her removal from the Civil Chief position was motivated by her having initiated a Title VII complaint of sex discrimination against Dedrick and Gill. Hudson also contended that the investigation

by Vole and her suspension from the U.S. Attorney's office were acts of retaliation, as well as the allegations of misconduct made by Gill, Dedrick, Cunningham, and Dake.

During the bench portion of the trial, the court found that defendants had articulated legitimate, nondiscriminatory reasons for their actions prior to November 21, 1991, and that the reasons were believable. Furthermore, the court found that the adverse personnel acts were not motivated by considerations of plaintiff's sex, but, instead, by Gill and Dedrick's belief that plaintiff was not performing her role as a supervisor adequately. Therefore, the court held that defendants' actions prior to November 21, 1991, did not violate Title VII. The jury, however, believed that plaintiff had established her claim of sex discrimination and retaliation based on the events occurring after November 20, 1991. The jury also found that Hudson had been constructively discharged on September 4, 1993.

The court also held that defendants did not violate the Equal Pay Act, 29 U.S.C. § 206(d)(1) when Gill elected not to recommend Hudson for a discretionary pay increase in January 1991 because her job performance, rather than her sex, was the reason that Gill did not request a pay increase for her. Additionally, the court found that Plaintiff had failed to establish that defendants had violated the Privacy Act.

DEFENDANTS' CONTENTION THAT PLAINTIFF'S FEE REQUEST SHOULD BE DENIED IN ITS ENTIRETY

"In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs." 42 U.S.C. § 2000e-5(k)

(Supp. 1993).[5] The general rule is that a prevailing party ordinarily is entitled to recover attorney's fees unless "special circumstances would render such an award unjust." *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Defendants admit that plaintiff is a prevailing party although they note that she was only partially successful on her claims.

Defendants contend that plaintiff's fee request should be denied in its entirety for several reasons, although they acknowledge that the total rejection of even a partially successful plaintiff's attorney's fee petition is rare. First, defendants maintain that the entire request should be denied because plaintiff has not apportioned her attorneys' time among the claims on which she prevailed, i.e., post-November 20, 1991, discrimination, retaliation, and constructive discharge, and those claims on which she did not prevail, i.e., discrimination and retaliation prior to November 21, 1991, and the Equal Pay Act and Privacy Act claims.

Defendants and plaintiff agree that the standard to be used in deciding this issue was set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

> Where a plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.

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5. Cases construing 24 U.S.C. § 2000e-5 apply the same standards as those interpreting 42 U.S.C. § 1988 or any other fee shifting statute *See e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

Id. "[I]f the litigation can be viewed as a series of discrete claims, then those claims may be analyzed individually in order to parse out those that were successful from those that were not." *In re Lewis*, 845 F.2d 624, 631 (6th Cir. 1988). However, if the case revolved around one claim and a core of common facts, then the overall result is the primary factor in determining the amount of attorney's fees. *Id.* at 631-32.

Here, the crux of plaintiff's lawsuit was that defendants had discriminated and retaliated against her. Although plaintiff's claims involved separate and distinct time periods, it was necessary for plaintiff to present to the jury evidence of the events prior to November 21, 1991, to show why the imminent return of Dedrick led to her constructive discharge. Since Dedrick left the Knoxville U.S. Attorney's Office shortly after Cunningham took office, plaintiff could not rely solely on the events after November 20 to prove her case. Therefore, defendants are incorrect in their assertion that "there were no common events connecting the Cunningham/Dake Administration to the Gill/Dedrick Administration."[6]

Additionally, plaintiff's other claims were related to the claims on which he prevailed. The alleged violations of the Privacy Act were intertwined with the allegations of post-November 20, 1991, discrimination and retaliation. The "secret" file on Hudson that was maintained by both Dedrick *and* Cunningham was alleged to violate the Privacy Act and to be an act of retaliation. And, plaintiff contended that defendants' failure to correct her 1990-1991

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6. Defendants state that the jury-tried claims of discrimination, retaliation, and constructive discharge were "based exclusively on events which occurred during the period in 1992-93, at a time when Jerry Cunningham and David Dake were the U.S. Attorney and Acting U.S. Attorney, respectively." (emphasis added). That statement greatly oversimplifies the issues in this case.

performance rating until June of 1992 was an act of retaliation post-November 20, 1991, as well as a violation of the Privacy Act.

All of plaintiff's claims were intertwined with each another, and, therefore, proof of most of the same events was necessary. Thus, it would not have saved anything but a marginal amount of time for plaintiff to have presented proof at trial only of the alleged discrimination and retaliation occurring after November 20, 1991, and of the constructive discharge since evidence of the factual setting prior to November 20 was necessary in order to place later events in their proper perspective.

As in *James v. Runyon*, 868 F.Supp. 911 (S.D.Ohio 1994), plaintiff's attorneys' time was devoted to the litigation as a whole, and "the intertwined facts make [the] case impossible to partition into neat categories of time spent on each separate claim." *Id.* at 916. The *James* court noted that, in retaliation cases, "it in peculiarly necessary for Plaintiff to establish the history of the parties' dealings." *Id.*

Plaintiff's attorneys' work post-trial which related only to those claims on which she lost are clearly denoted as such in plaintiff's documentation, and the court has made allowances for such as discussed below by reducing the fee "in a manner rationally related to the amount of time counsel actually devoted to unsuccessful claims that were not essential to the prosecution of the successful claims." *Perotti v. Seiter;* 935 F.2d 761, 764 (6th Cir. 1991). *See also Hensley*, 461 U.S. at 436-437 ("The district court may attempt to identify specific hours that should be eliminated, or it may pimply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.")

Next, defendants argue that plaintiff's attorneys' billing records are inadequate. Fee applicants must submit documentation that is a reliable and contemporaneous recordation of time spent on legal tasks that are described with reasonable particularity. *See Hensley*, 461 U.S. at 440-41 (Burger, C.J., concurring). The documentation must be sufficient to permit the district judge to weigh the hours claimed against his own knowledge and experience of the time required to complete similar matters so that hours not reasonably expended can be excluded. *Id.* at 433.

Here, the court finds that plaintiff has met her burden in submitting sufficient documentation as to the hours her attorneys spent on her claims. Consequently, defendants' position that plaintiff's fee application should be denied in its entirety is without merit.

PLAINTIFF'S FEE REQUEST FOR SOBIESKI AND MONCIER

Defendants' contention that the fee request for work performed by plaintiff's former counsel Wanda Sobieski and Herbert Moncier should be denied is well taken. Plaintiff initiated this action by filing a petition for a temporary restraining order ("TRO") and a preliminary injunction. At that time, Ms. Sobieski represented plaintiff. When Sobieski withdrew as counsel for plaintiff, Mr. Moncier assumed plaintiff's representation. The court granted plaintiffs petition and issued a temporary restraining order enjoining defendants from taking any adverse employment action against plaintiff. By agreement, the TRO was extended to remain in effect pending a hearing on plaintiff's petition for a preliminary injunction. This action effectively transformed the TRO into a preliminary injunction.

Plaintiff subsequently filed a separate Title VII employment discrimination suit, and the two proceedings were consolidated.

The court postponed the hearing on the petition for a preliminary injunction and ordered that the TRO remain in effect until the hearing. Defendants appealed the district court's decision to allow the TRO to remain in effect, and the Sixth Circuit found that the district court had erred by indefinitely continuing the TRO. *Hudson v. Barr*, 3 F.3d 970, 975 (6th Cir. 1993). The TRO was dissolved, and the district court was instructed to conduct a preliminary injunction hearing without delay. *Id.* at 976. Just 12 days before the Court of Appeals dissolved the TRO, plaintiff resigned from her position as an Assistant U.S. Attorney and claimed that she had been constructively discharged, thus mooting the issue of the preliminary injunction.[7]

A fee award under Title VII in appropriate only when the party seeking the award has prevailed. "Determining whether a party prevailed within the meaning of the statute is the threshold question to be answered before granting any attorneys' fee request." *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1173 (6th Cir. 1990). In this case, the court must determine whether a plaintiff who obtains a temporary restraining order, which is subsequently converted into a preliminary injunction, merely to preserve the *status quo ante* in a lawsuit is a "prevailing party" within the meaning of section 2000e-5(k).

The Sixth Circuit has held that "to qualify a plaintiff as 'prevailing' the preliminary relief obtained must represent an unambiguous indication of probable success on the merits, and

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7. Plaintiff submitted her letter of resignation on August 18, 1993. The Court of Appeals issued its decision on August 30, 1993.

not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff." *Id.* (emphasis added); *see Laurenzo v. Mississippi High School Activities Ass'n*, 708 F.2d 1038, 1042 (5th Cir. 1983). Here, the court granted plaintiff's application for a TRO because of "the seriousness of this case and the fact that the Court itself has not had time to consider [plaintiff's] petition." The only other action taken on plaintiff's petition for injunctive relief was the court's order that the TRO would "remain[ ] in effect pending the hearing on plaintiff's request for a preliminary injunction."

The court granted, and later extended, the TRO merely to preserve the *status quo ante* pending adjudication of plaintiff's petition for a preliminary injunction and her Title VII claims. The preliminary relief granted falls far short of "an unambiguous indication of probable success on the merits," especially in light of the fact that the district court's decision to extend the TRO indefinitely was reversed by the Sixth Circuit. *Webster v. Sowders,* 846 F.2d 1032, 1036 (6th Cir. 1988). Consequently, the court concludes that the TRO issued in this action did not constitute a determination of the substantial rights of the parties. Therefore, plaintiff was not a prevailing party for work performed in conjunction with obtaining and extending the TRO.

Additionally, plaintiff lost on the claims that allegedly accrued while Sobieski and Moncier performed their work.[8] "[A] plaintiff is not entitled to attorneys' fees based on interim orders that may have in fact benefitted plaintiff when plaintiff lost the case on the

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8. This issue is different from whether the attorneys who actually brought the matter to trial should be compensated for time expended on the pre-November 21, 1991, claims. As discussed above, the discrimination and retaliation claims of both time periods are too intertwined with each other and with the constructive discharge claim to be separated.

underlying merit" of the claim. *N.A.A.C.P. Detroit Branch v. D.P.O.A.*, 46 F.3d 528, 530 (6th Cir. 1995). Because the majority of the work performed by Sobieski and Moncier involved obtaining the TRO and plaintiff did not "prevail" within the meaning of section 2000e-5(k), the request for fees for work performed by Sobieski and Moncier and for their costs is denied.

Furthermore, Sobieski has asked for payment of fees for services performed *after* she ceased representing plaintiff. On January 7, 1992, Sobieski and her associate, Diane Messer, submitted a notice of substitution of counsel. In that notice, Sobieski stated that she must withdraw from the case because she had become a potential witness and that Herbert Moncier was being substituted as counsel of record. If Sobieski was prohibited from representing plaintiff because of her potential witness status, then she cannot now seek fees for work she performed after she became aware of that status.

Several of the entries that post-date January 7, 1992, appear to relate to Sobieski's role as a witness in the case, e.g., 11/8/93 "Telephone conference with Marilyn regarding Jerry Cunningham statements;" 11/11/93 "Go through file to find notes Wanda Sobieski made about Jerry Cunningham, by law clerk" 4/4/94 "Telephone conference with Jerry Cunningham;" and 4/5/94 "Telephone conference regarding telephone conference with Jerry Cunningham." Clearly, Sobieski cannot be compensated for time that she spent in preparation as a witness.

For all these reasons, the request for attorney's fees and cost for work performed by Ms. Sobieski and Mr. Moncier is denied.

Appendix B

PLAINTIFF'S FEE REQUEST FOR KATOR, SCOTT & HELLER

Plaintiff seeks compensation for the law firm of Kator, Scott & Seller for 355.2 hours of legal services from May 22, 1992, through February 16, 1993. The majority of that work was performed by David Shapiro. The method for determining reasonable attorney's fees under Title VII is the "lodestar" approach using the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Coulter v. State of Tennessee,* 805 F.2d 146, 148 (6th Cir. 1986). There is a strong presumption that the lodestar amount represents the reasonable fee award and that the lodestar amount should only be adjusted upward in rare and exception cases. *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565-66 (1986). Defendants have raised numerous objections to the amount of compensation sought for Kator, Scott & Beller. The court must determine whether the hours claimed by the plaintiff were reasonably expended and must eliminate any hours that are excessive, redundant, or otherwise unnecessary. *Hensley,* 461 U.S. at 434. The court finds that the hours which the law firm of Kator, Scott & Heller expended in this case are reasonable and necessary with the following reductions.

The court will disallow the following hours because they relate to the claims on which plaintiff was unsuccessful.[9]

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9. Rather than reducing the time spent by a certain percentage to allow for the time spent on the unsuccessful claims, the court feels that its is more accurate to deduct the actual hours denominated for the Privacy Act or Equal Pay Act claims or for the TRO or preliminary injunction.

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10/25/92	TRO/PI Research	1.50[10]
10/26/92	TRO/PI Research	1.50
10/27/92	Travel for Hearing	1.30
10/27/92	Prepare for Motion Hearing	1.00
10/27/92	Conferences re TRO Hearing	.70
10/27/92	Conferences re Hearing	2.00
10/27/92	Research & Fax Info	.70
10/28/92	Prepare for Motion Hearing; Travel	2.50
10/28/92	Motion Hearing[11]	2.80

Plaintiff has listed the following amounts of time for Shapiro to draft and then review her complaint.

7/17/92	2.80
7/21/92	2.00
7/22/92	2.70
7/23/92	2.00

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10. The actual entries reflected that 3.00 hours was expended on both 10/25/92 and 10/26/92. However, other activities were listed as well as "TRO/PI Research." Therefore, the court has only deducted 1/2 the time spent for there endeavors.

11. The docket sheet reflects that the hearing on the TRO was set for October 27, 1992. No "motion hearing" is listed for October 28, 1992. The court concludes that the October 28 entry should be October 27. *See Knop v. Johnson*, 712 F.Supp. 571, 590 (W.D.Mich. 1989) (Some margin of error is allowed in the recording process.)

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7/24/92	2.80
8/3/92	.50
8/12/92	1.70
8/18/92	1.70
10/5/92	8.00
10/6/92	1.00
10/15/92	.70
10/16/92	2.30
10/20/92	1.00
10/21/92	.80

This amount is excessive, especially in light of the fact that the complaint had to be amended twice. The facts of the case and the legal theories underlying the claims are relatively straightforward, and Shapiro is a skilled attorney. Therefore, the court finds that the total amount of hours claims for drafting and reviewing the initial complaint should be cut in half. Plaintiff will be allowed to claim 15.00 hours for the preparation and review of the initial complaint.

In making this determination, the court has considered the fact that several dates noted time spent on both drafting or reviewing the complaint and other activities. The court has taken this into consideration in finding that the amount of time claimed should only be cut in half. *Cf. Sassaman v. Heart City Toyota,* 879 F.Supp. 901, 917 (N.D.Ind. 1994) ("Although these entries encompass other activities for which time was reasonably expended, the court is not required to allocate the time spent on each activity within an entry, and so will disallow the entire entry.")

Appendix B

Defendants object to paying for fees incurred for work performed before the issuance of Cunningham's June 25, 1992, memorandum. They contend that the memorandum formed the basis of the jury's verdict and that all issues that arose before June 25, 1992, were decided in their favor.

Defendant's argument is without merit for two reasons. First, the jury was presented with plaintiff's claims that arose after November 20, 1991, not June 25, 1992. Plaintiff testified that several acts of discrimination and retaliation occurred before June 25, 1992, including Cunningham's possession of a "secret file" that Dedrick had started and the failure to correct her performance evaluation to reflect the upgraded rating. Second, as already noted, plaintiff's claim of constructive discharge could only be understood in the context of the events that began with her negative evaluation by Dedrick. Therefore, events prior to June 25, 1992, were related to all the claims on which plaintiff prevailed, and the court had reviewed all the hours submitted by Kator, Scott & Heller to determine if they are reasonable.

Defendants object to the claim for compensation for travel time. Whether to compensate a plaintiff for her attorney's time spent traveling and at what rate are matters left to the discretion of the district court. *Perotti*, 935 F.2d at 764. Here, the travel time claimed by plaintiff's attorneys is not excessive and appears to have been reasonably necessary to litigate this matter. Consequently, all the time claimed for travel will be allowed.[12]

All the other hours claimed are allowed, and plaintiff will be

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12. The travel time submitted by Swick & Shapiro will also be allowed as being necessary for the litigation of plaintiff's claims.

compensated for 326.20 hours for the work performed by the law firm of Kator, Scott & Heller.[13]

The Supreme Court has determined that "reasonable" fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The Sixth Circuit has applied this same standard to fee applications under Title VII. *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 909 n. 4 (6th Cir. 1991). *See Coulter,* 805 F.2d at 149 (The hourly rate "should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question.") A "reasonable attorney's fees is one that is adequate to attract competent counsel without producing a windfall to the attorney. *Blue,* 465 U.S. at 897. Fee applicants must furnish specific support for the hourly rate they propose. *Id.* at 895-96.

Plaintiff has submitted the declaration of Joseph Scott, a partner in the law firm of Kator, Scott & Heller. He states that in 1992, the billing rate for himself, David Shapiro, and Douglas Huron was $225 an hour. This rate increased to $250 per hour for work performed after January 1, 1993. Scott and Huron's current billing rate is $275 per hour. The rate at which the law firm billed its associates' work at the time it was performed was $150 for Katherine Garrett and $125 for Stephen Chertkof. Their current billing rate is $175.

The fact that attorneys customarily charge a higher rate is not determinative of the rate they should receive under the attorney fee statute. *See Coulter,* 805 F.2d at 149 ("[A] renowned lawyer

13. This figure includes 306.50 hours for David Shapiro, 15 hours for Joseph Scott, 3.7 hours for Douglas Huron, .4 hours for Katherine Garrett, and .6 hours for Stephen Cherthof.

who customarily receives $250 an hour in a field in which competent and experienced lawyers in the region normally receive $85 an hour should be compensated at the lower rate.") Although plaintiff has asked for her attorneys to be compensated at the prevailing rates for their home practice, it is not an abuse of discretion for the district court to apply the local market rate. *Wayne v. Village of Sebring*, 36 F.3d 517, 533 (6th Cir. 1994).

The only evidence in the record as to the billing rate for attorneys in the Knoxville, Tennessee, area are the declarations of James Andrews, Wanda Sobieski, Herbert Moncier, Ann Short, John Lucas, James Andrews states that his current hourly rate for Title VII litigation is $150 per hour. During the time period encompassing the litigation of plaintiff's cane, his billing rate ranged from $125 to $135 per hour. Berbert Moncier states that, during the relevant time period, his billing rate varied from $150 to $250 per hour. The billing rate of his associate, Ann Short, ranged from $100 to $125 per hour. Most indicative of the market rate for attorneys in the Knoxville area for Title VII litigation is that of Wanda Sobieski, who has extensive Title VII experience. She states that her hourly rate in 1991 was $125 per hour, and after January 1992 her rate rose to $135 per hour. Her associate, Diane Messier, had an hourly rate of $90 per hour in 1991 and $95 in 1992. Plaintiff has submitted the declaration of John Lucas, an attorney who took no part in the proceedings, to establish the market rate. However, Lucas states that his general area of practice is in commercial litigation, and he does not state that he has any experience in Title VII litigation or any knowledge of what Title VII litigators charge. Therefore, his declaration is of little relevance in establishing the market rate to be used. Defendants have offered no evidence as to the appropriate market rate to use, although they have suggested that the attorneys at Kator, Scott & Heller should not receive more than $125 per hour.

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The court finds that the work performed by David Shapiro, Joseph Scott, and Douglas Huron should be paid at the rate of $150 per hour, which is slightly more than the $135 rate charged by Sobieski during the time period in which this work was performed. The work performed by the associates, Catherine Garrett and Stephen Cherthof, should be paid at the rate of $110 per hour, which is within the range established by Ann Short, Moncier's associate, and is slightly more than that established by Diane Messer, Sobieski's associate.

Plaintiff has asked that the hourly rate set for her attorneys at Kator, Scott & Heller be enhanced to their current billing rates to compensate them for the delay in payment, inflation since the work was performed, and the government's litigation strategy which needlessly complicated and prolonged the litigation. Adjustments upward may be made in certain circumstances. *See Kelley v. Metropolitan Co. Bd. of Education*, 773 F.2d 677 (6th Cir. 1985). However, the burden of proving that an upward adjustment is necessary in calculating a reasonable fee is on the fee applicant. *Blum*, 465 U.S. at 889.

Plaintiff cannot complain of the delay in the litigation. Although she filed her initial complaint on October 27, 1992, she filed an amended complaint on April 16, 1993, adding the Department of Justice as a defendant, and a second amended complaint on October 28, 1993, adding a claim of constructive discharge, thus postponing the trial date twice. Her contention that defendants alone complicated and prolonged the matter is also without merit. Both parties engaged in dilatory tactics.[14] *See*

14. This case has, from the very outset, violated Rule 1 of the Federal Rules of Civil Procedure which encourages the "speedy and inexpensive determination of every action." This is the type of case which Congress had in mind when it passed the Civil Justice Reform Act, 28 U.S.C. § 471, *et seq.*, in 1990.

Appendix B

Order Part'ly Gr'ting and Part'ly Denying Defs' M. to Compel Payment of Exp. Wit. Fees ("Before deciding the merits of the arguments presented, the court notes that this is not the first motion in this action in which the court has been asked to decide a trivial issue arising more from the uncompromising nature of counsel than from an honest dispute.") To the extent that defendants may have complicated or prolonged the case, plaintiff's attorneys will be compensated for the extra amount of work through the increased number of hours to be compensated, rather than by an increased hourly rate. There has been no proof that there has been an inflationary effect on the fee award, and, even if there had been, it is not sufficient to justify an enhancement.

The "unpopularity" of the case does not warrant an enhancement. Although Sobieski, Moncier, and Andrews have stated in their declarations that they were reluctant to take on a case against the U.S. Attorney's Office and the Department of Justice, there is little evidence of such reluctance. Plaintiff does not appear to have had any difficulty in obtaining representation as evidenced by the number of attorneys, including local counsel, who have represented her during the course of this litigation.

The Supreme Court has stated that, when a plaintiff has obtained excellent results, the attorney should recover a fully compensatory fee and that, in some cases of exceptional success, an enhanced award may be justified. *Blum,* 465 U.S. at 901). Here, plaintiff has not produced evidence of exceptional success, as distinguished from excellent success, and therefore, her request for a fee enhancement is denied.[15]

15. Although the request for a fee enhancement has been denied, the court notes that the fees set for the attorneys at Kator, Scott & Heller for their work in 1992 and 1993 is the same as that set for David Shapiro, Richard Swick, and James Andrews for their more recent work. Therefore, in effect, there has been a fee enhancement.

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In conclusion, plaintiff is awarded $48,890.00 for work performed by the law firm of Kator, Scott & Heller.[16]

The hours which the law firm of Swick & Shapiro expended in this case are reasonable with the following reductions:

4/30/93	Prep for OPR meeting,[17]	2.5
5/3/93	Prep for OPR meeting	1.2
5/4/93	Review & prep for OPR meeting	2.4
5/5/93	Prep for OPR meeting; OPR meeting	3.0
5/6/93	Review interim fee request[18]	1.0

16. David Shapiro 306.50 hours @ $150 per hour = $45,975.00
Joseph Scott 5.00 hours @ $150 per hour = $2,250.00
Douglas Huron 3.70 hours @ $150 per hour = $555.00
Katherine Garrett .40 hours @ $110 per hour = $ 44.00
Stephen Cherthof .60 hours @ $110 per hour = $66.00

17. Plaintiff's attorney's time spent with her at the OPR meeting and at the Senate hearing was not time spent preparing or litigating her case. The OPR investigation and subsequent meeting were events that were alleged to be acts of discrimination and retaliation. The Senate hearing was an opportunity for plaintiff to expound on her own case but was not part of the case itself. *Cf. Delaware Valley*, 478 U.S. at 561 ("[F]or time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation.")

18. The interim fee request of Sobieski and Moncier for work performed in obtaining the TRO was denied. See discussion above of fee request for Sobieski and Moncier.

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5/10/93	Tel w/ OPR & w/ client	.4
5/11/93	Tel w/ client re: OPR	.2
5/12/93	Review; tel w/client re: Steele meeting w/ OPR	1.4
5/14/93	Review OPR material, etc.	4.3
5/19/93	Tel w/ client re: Senate	1.3
5/25/93	Prep Senate testimony Review Senate Testimony	2.1 3.5
5/26/93	Rep client at S. Committee	5.4
6/2/93	Review opp to interim fee	1.0
6/10/93	Review opp to fee application	1.3
6/28/93	Draft/edit filing re: other attys' interim fee petition[19]	7.0
6/30/93	Conf/ w/ other atty's re: interim fees	7.5
8/30/93	Review at order denying other atty's fee applic	1.2
9/27/93	Review order from Ct of App	1.6
10/3/94	Duplicate entry[20]	18.0

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19. The entries for 6/28/93 and 6/30/93 lists several activities other that those involving the interim fee petition. The court has divided these hours between the interim fee petition and the other activities.

20. Shapiro has acknowledged that this was a duplicative entry. Be also states that the 16 hours listed for October 1, 1994, should have reflected October 2. Otherwise, the total hours worked for October 1 would have totaled 34 hours. The court has accepted this explanation.

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10/14/94	Teleconf w/Washington Times	.5
10/15/94	Press activities[21]	3.0
10/17/94	Press activities	2.5
10/24/94	Press activities	1.2
8/12/95	Press activities	.7

The following entries must be stricken because they relate to the preparation of plaintiff's proposed findings of fact and conclusions of law in the non-jury portion of the trial in which plaintiff did not prevail.

10/26/94	.4
1/6/95	.4
1/7/95	2.8
1/8/95	3.5
1/9/95	4.0
1/10/95	5.0
1/11/95	3.0
1/12/95	2.2
1/12/95	.5
1/26/95	2.0
1/27/95	3.0

21. Time spent talking with the media is not compensable because it is not " 'ordinarily necessary' to secure the final result obtained from the litigation." *Delaware Valley*, 478 U.S. at 561. *Accord Knight v. State of Ala.*, 824 F.Supp. 1022, 1034 (N.D.Ala. 1993); *Gray v. Romero*, 709 F.Supp. 325, 327 (D.R.I. 1989); *Ramos v. Lamm*, 632 F.Supp. 376, 384 (D.Colo. 1986).

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1/28/95	2.0
1/29/95	4.5
1/31/95	1.0
2/3/95	2.0
2/4/95	6.0
2/5/95	8.0
2/7/95	9.0
2/8/95	7.0
2/9/95	5.0
2/10/95	12.0
2/11/95	10.0
2/12/95	15.0
2/12/95	4.0
2/13/95	7.0
2/13/95	4.1
2/14/95	1.4
2/15/95	.2
4/5/95	3.0
4/5/95	1.5
4/6/95	2.3
4/7/95	3.0
4/8/95	8.0
4/9/95	10.0

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4/10/95	5.0
4/11/95	7.0
4/12/95	4.0
4/13/95	8.0
4/14/95	6.5
4/14/95	1.5
4/15/95	14.0
4/15/95	3.5
4/24/95	.7
8/10/95	1.4
8/11/95	3.0
8/11/95	1.0
8/14/95	1.5
8/15/95	1.0
8/15/95	3.8
8/19/95	1.4

Defendants object to the time the attorneys spent working on the motions for summary judgment because plaintiff did not prevail at trial on the majority of the issues in the motions. Regarding time spent on summary judgment motions, the question is whether the claimant prevailed on the motion or prevailed on an issue raised in the motion in part as a result of the motion. *Coulter,* 805 F.2d at 151. Here, the court denied substantially all the issues in defendants' motions for summary judgment. Therefore, the court will not deduct the time plaintiff's attorneys worked on these motions.

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Defendants contend that plaintiffs attorney should not be compensated for the time and travel involved with the taking of the deposition of Nancy Palmer since she was not permitted to testify at trial. However, defendants served notice and took that deposition. They cannot complain because plaintiff was forced to have an attorney present to protect her interests.

Defendants have asked the court to eliminate the trial time spent examining Gill, Dedrick, and other witnesses who testified about events occurring prior to November 21, 1991. They also object to compensation for the taking of the depositions of Jinnette and Cook[22] since they "participated exclusively in the events which gave rise to the claims decided by the Court." The court has previously discussed the intertwining of the claims. Clearly, plaintiff could not have prevailed on her claim of constructive discharge without testimony concerning the events prior to November 21, 1991, especially the testimony of Gill and Dedrick.

Defendants have objected to time spent opposing defendants' efforts to have certain documents returned. However, even though the court ordered plaintiff to return the documents, they were admitted into evidence at trial in redacted form.

Consequently, the court finds that the law firm of Swick and Shapiro should be compensated for 1770.9 hours.[23]

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22. Time spent taking the deposition of Cook is compensable even though she did not testify at trial. *Cf. Knop v. Johnson*, 712 F.Supp. 571, 581 (W.D.Mich. 1989) (Costs for depositions allowable if "reasonably necessary to plaintiff's success on the merits" even if the deposition was not used at trial.

23. This figure includes 1363.1 hours for Shapiro, 386.9 hours for Swick, and 20.9 hours for Bodner.

Appendix B

Plaintiff has not sought an enhancement to the hourly rates of the law firm of Swick & Shapiro because their hourly rates are more current than those of Kator, Scott & Heller. She has asked for Richard Swick and David Shapiro to be compensated at the rate of $250 per hour for work performed between March 1, 1993, and December 31, 1994. For work performed between January 1, 1995, and June 30, 1995, she seeks $275 per hour, and for work performed after July 1, 1995, through the present she seeks $300 per hour. Plaintiff has asked that Diane Bodner, an associate in the firm be compensated at the rate of $175 per hour for work performed between March 1, 1993,[24] and June 30, 1995, and $200 for the period July 1, 1995, through the present.

The only evidence of the prevailing market rate for Title VII litigation in the Knoxville, Tennessee, area has been discussed above. Because Shapiro and Swick are both experienced and capable attorneys in the area of Title VII, the court finds that they should be compensated at the rate of $150 per hour. The only evidence presented as to Bodner's qualifications is the fact that she is a member of the bars in Maryland and the District of Columbia and has practiced with Swick and Shapiro since February 28, 1993. Consequently, she will be paid at the rate of $110 per hour.

Based on the above, plaintiff is awarded $264,799.00 in attorney's fees for work performed by the law firm of Swick & Shapiro.[25]

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24. The time sheet presented reflects the time period of March 1, 1994, through June 30, 1995. However, David Shapiro's Declaration states that Bodner began working on the case after February 28, 1993.

25. David Shapiro 1363.1 hours @ $150 per hour = $204,465.00
Richard Swick 386.9 hours @ $150 per hour = $ 58,035.00
Diane Bodner 20.9 hours @ $110 per hour = $ 2,299.00

Appendix B

PLAINTIFF'S FEE REQUEST FOR AILOR, ANDREWS & HUDSON

The hours which James Andrews expended in this case are reasonable with the following reductions. The hours spent researching and writing the proposed findings of fact and conclusions of law must be eliminated since plaintiff did not prevail on the claims decided by the court.[26]

6/28/94	Research Privacy Act liability	2.25
7/20/94	Research Privacy Act damages	2.50
10/27/94	Research on Front Pay	6.50
10/28/94	Research Privacy Act damages	5.00
10/31/94	Research Privacy Act damages	6.50
11/26/94	Research Privacy Act damages	5.50
11/27/94	Review records on Privacy Act	2.25
12/15/94	Research Privacy Act	4.50
12/16/94	Research Front Pay & Mitigation	8.50
12/17/94	Review & Parse Transcript	14.50
12/18/94	Review & Parse Transcript	12.50
12/19/94	Review & Parse Transcript	10.75
12/19/94	Telephone conference re brief for judge	.50

26. Plaintiff was awarded back pay and same injunctive relief by the court. However, only a small portion of the findings of fact and conclusions of law dealt with the back pay issue, and the court rejected the amount of back pay proposed by plaintiff. Therefore, the court has eliminated all the time that refers to the findings of fact unless it is clearly labeled as referring to the back pay or injunctive relief issue.

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12/21/94	Research cases on Privacy Act	10.75
12/22/94	Telephone conference re submission on Privacy Act	.25
12/22/94	Research Equal Pay	10.50
12/23/94	Parse Transcript/correlate w/bench issues	13.75
12/24/94	Parse Transcript	10.50
12/25/94	Parse Transcript	7.25
12/26/94	Parse Transcript	8.50
12/27/94	Parse Transcript	8.50
12/28/94	Parse Transcript; Meeting with client	3.50
12/29/94	Parse Transcript	1.50
12/30/94	Parse Transcript	.50
12/31/94	Parse Transcript	2.00
1/1/95	Parse Transcript	1.00
1/2/95	Parse Transcript	6.50
1/3/95	Legal research; draft FF and CL for judge	11.50
1/4/95	Draft FF and CL	2.50
1/6/95	Rewrite Draft	8.00
1/6/95	Conf. w/Shapiro re: FFCL	.50
1/15/95	Telephone conferences[27]	.25

27. Some entries, such as this one, do not specifically refer to the findings of fact. However, they are in the same time frame as the preparation of the findings of fact and, therefore, absent evidence that the entries relate to a claim on which plaintiff prevailed, the court will eliminate this time.

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1/16/95	Tel. to Shapiro	.25
1/25/95	Telephone conference re: FFCL	.50
2/8/95	Telephone conference re: Brief	.25
2/8/95	Research testimony re: Hudson	1.25
2/8/95	Telephone conference	.75
2/9/95	Conf. w/ MLB & Shapiro	1.00
2/10/95	Telephone call to Shapiro	.25
2/11/95	Annotate FFCL	12.50
2/11/95	Tel. to Shapiro	.25
2/12/95	Annotate FFCL	10.75
2/12/95	Tel. to Shapiro	.25
2/13/95	Response to Judge Jordan Show Cause Orders[28]	.50
2/13/95	Telephone call to Shapiro	.25
3/3/95	Conf. w/ MLB & Shapiro	.25
4/5/95	Research Privacy Act Damages	12.50
4/5/95	Telephone conference w. Shapiro	.25
4/6/95	Research Front Pay; conf. MLJ	13.25
4/8/95	Draft Reply	11.00
4/9/95	Rework Draft with MLH	3.50
4/10/95	Telephone call to Shapiro	.25
4/11/95	Telephone conference re: front pay	.50

28. The court has no idea what this entry relates to.

4/17/95	Telephone call re: final reply	.25
4/17/95	Telephone conference re: reply	.50
4/18/95	Review final plaintiff's reply	.25
4/18/95	Telephone conference w/ Shapiro	.50
4/24/95	Telephone conference re: oral argument	.50
4/27/95	Review Government Objection	.25
7/12/95	Reviewed new authority	1.25
8/11/95	Review final order	1.25
8/11/95	Telephone conference w/Shapiro	.50
8/11/95	Parse cases in court opinion	4.75
8/12/95	Press Released[29]	1.00
8/16/95	Review transcript for inconsistencies w/ Judge's view	4.50

Andrews had listed two entries concerning a possible appeal. Whether or not plaintiff should be awarded attorney's fees for an appeal is premature. *See Prichard v. Ledford,* 767 F.Supp. 1430, 1431 (E.D. Tenn. 1991). Therefore, the entries for 8/12/95 and 8/13/95 will be stricken, and Andrews' fee petition will be reduced by an additional 3.50 hours.

Plaintiff has asked that Andrews be compensated for all his work during the entire trial. Although multiple representation can be productive, there in a danger of duplication. *Coulter,* 805 F.2d at 152. If duplication of effort is a serious problem, the district court can make an across the board reduction by reducing the

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29. As previously stated, the court is eliminating all time spent on public relations.

trial time by a certain percentage. *Id.* Shapiro was lead counsel and conducted the trial. It appears that Andrews' assistance was primarily behind the scenes. At least some of that assistance was dependent on Andrews' presence in the courtroom so that he could follow the proceedings and help with witness preparation and the research of legal issues after hours. Therefore, the court will not strike all the hours that Andrews spent in trial preparation and the trial itself as being duplicative of the time spent by Shapiro. Instead, the amount of his time spent in trial, trial preparation, and the pre-trial conference will be reduced by 25%. The entries which reflect the time spent by Andrews on these activities are:

8/31/94	4.50
9/1/94	5.00
9/6/94	6.50
9/7/94	9.00
9/8/94	9.50
9/9/94	14.50
9/10/94	13.25
9/10/94	.75
9/11/94	15.00
9/13/94	6.50
9/14/94	14.00
9/14/94	.25
9/15/94	11.75
9/16/94	13.25
9/16/94	.25

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9/17/94	9.50
9/18/94	3.75
9/18/94	15.00
9/19/94	16.50
9/20/94	16.00
9/21/94	17.50
9/22/94	19.00
9/23/94	.75
9/24/94	15.50
9/25/94	16.00
9/26/94	18.25
9/26/94	.25
9/27/94	18.50
9/27/94	.25
9/28/94	18.75
9/29/94	14.50
9/29/94	.25
9/30/94	.50
10/1/94	16.00
10/2/94	17.00
10/3/94	18.75
10/3/94	.25
10/4/94	18.25

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10/5/94	14.50
10/6/84	16.75
10/7/94	14.00
10/8/94	9.50
10/9/94	14.50
10/10/94	13.75
10/11/94	.25
10/11/94	18.50
10/11/94	.25
10/12/94	16.75
10/12/94	.25
10/13/94	14.50
10/13/94	.50
10/14/94	.50
10/14/94	2.00

The hours to be reduced by 25% total 531.50. Thus, for trial preparation and trial time, Andrews will be compensated for 399 hours instead of the: full 531.50 hours.

Plaintiff has not sought an enhancement for Andrews. She has asked that he be compensated at the rate of $125 per hour. Andrews' declaration indicates that he received his J.D. only one year before he began representing plaintiff. Be does not indicate that he has had any Title VII experience, other than the present case. An Order Approving Fees and Expenses and Taxing Costs filed on September 6, 1994, in a conservatorship proceeding

awarded Andrews $110 per hour. Based on the evidence in the record as to the prevailing market rate for attorneys in the Knoxville, Tennessee, area, Andrews' relative inexperience in Title VII litigation, and the fee awarded him in another court, the court finds that Andrews should be compensated at the rate of $110 per hour.

Based on the above calculations, Andrews will be compensated for 581.75 hours at the rate of $110 per hour for a total fee award of $63,992.50.

REQUEST FOR COSTS

Rule 54(d) of the Federal Rules of Civil Procedure provides that "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Absent a statute or rule to the contrary, Rule 54(d) creates a presumption that costs should be awarded to a prevailing party under 28 U.S.C. § 1920 unless it would be inequitable under the totality of the circumstances to put the burden of such costs on the losing party. *Rosser v. Pipefitters Onion Local 392*, 885 F.Supp. 1068 (S.D.Ohio 1995). Although departures from Rule 54(d) are permitted, the court's discretion is more limited than it would be if the rule were nondirective. *Id.* at 863. The unsuccessful party has the burden to show why the presumption favoring an award of costs to the prevailing party should be overcome. *Id.* at 863-64. "The award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary, and the appellate courts will not normally interfere with the exercise of that discretion." *Northcross v. Bd. of Ed. of Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979).

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There are two different sources that allow a court to award out-of-pocket expenses to a prevailing Title VII plaintiff. *Id.* at 639. Costs such as court fees and court reporter expenses are awarded pursuant to Rule 54(b) and 28 U.S.C. § 1920 rather than §2000e-5(k). *Goostree v. State of Tenn.*, 796 F.2d 854, 863-64 (6th Cir. 1986). However, "incidental and necessary expenses incurred in furnishing effective and competent representation" are included in the concept of attorney's fees. *Northcross*, 611 F.2d at 639. The authority to award a "reasonable attorney's fee" includes the authority to award "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Id.* These expenses include reasonable photocopying, paralegal expenses, travel, and telephone costs. *Id.*

Defendants have made two objections to the list of costs submitted by plaintiff. First, they contend that the court should deny plaintiff's request for costs because she has not apportioned the costs among the claims on which she prevailed and the claims that she lost. As discussed above, plaintiff's claims were intertwined, and, therefore, the costs cannot be readily apportioned. Thus, this argument is without merit.

Next, defendants argue that plaintiff has listed costs that are noncompensable such as meals. Plaintiff has asked for reimbursement for the law firm of Swick & Shapiro for expenses in the amount of $26,812.37 plus $187.50. Of this amount, $5,592.06 is requested for travel and subsistence. Defendants do not contend that this amount is not reasonable but rather that subsistence, i.e., meals, are not compensable as an out-of-pocket expense. However, a plaintiff's attorney's travel expenses such as transportation, lodging, parking, and food are compensable

as part of a reasonable attorney's fee. *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983), citing *Northcross*, 611 F.2d at 639. Therefore, defendants' objection is without merit.

Defendants have not objected to any other specific costs, and the court finds that all items claimed by plaintiff are compensable and reasonable with the following exceptions. Plaintiff has requested reimbursement for herself in the total amount of $6,592.17. She has asked to be reimbursed for $641.00 for airfare and $130.92 for lodging.[30] She has also requested $848.14 for mileage and parking. Since plaintiff was a local party, these expenses are denied. She is $4971.11 for the costs of Federal Express, UPS, telephone toll charges, photocopying, court reporters, and postage.

Plaintiff has asked for reimbursement in the amount of $8,638.10 for costs incurred by James Andrews, $12,461.70 for costs incurred by the law firm of Kator, Scott & Heller, and $26,999.87 for costs incurred by the law firm of Swick & Shapiro.[31] These totals reflect the cost of long distance phone calls, fax charges, overnight delivers and couriers, postage, photocopying and printing, travel and subsistence, expert witness expenses, witness fees, deposition,[32] court reporters, electronic

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30. It is conceivable that it was necessary for plaintiff to incur lodging and airfare expenses. However, plaintiff has offered no explanation as to why these expenses were necessary, and the court will not indulge in speculation.

31. As explained above, the request for reimbursement for costs incurred by Wanda Sobieski and Berbert Moncier is denied.

32. The costs of all the depositions taken during the litigation were necessary for the case even though some of them were not used at trial. *See Rosser*, 885 F.Supp. at 1072.

legal research, materials and supplies, filing fees, and trial exhibits. Because these items are compensable and defendants have made no showing that the amounts claimed are not reasonable, the court finds that plaintiff should be compensated for the amounts claimed.

SUMMARY AND CONCLUSION

In summary, plaintiff's request for attorney's fees and costs for Wanda Sobieski and Herbert Moncier is DENIED. Plaintiff's request for attorney's fees and costs for the law firms of Kator, Scott & Heller and Swick & Shapiro and for James Andrews is PARTIALLY GRANTED to the following extent:

Attorney's Fees for Kator, Scott & Heller	$ 48,890.00
Attorneys Fees for Swick & Shapiro	$264,799.00
Attorney's Fees for James Andrews	63,992.50
TOTAL ATTORNEY FEE AWARD	**$377.681.50**
Costs for Kator, Scott & Heller	$12,461.70
Costs for Swick & Shapiro	26,999.87
Costs for James Andrews	8,638.10
Costs for Marilyn L. Hudson	4,971.11
TOTAL AWARD FOR COSTS	**$53,070.78**
TOTAL FEES AND COSTS AWARDED	**$430,752.28**

The clerk will prepare a judgment incorporating the jury verdict, the court's findings of fact and conclusions of law, and this order awarding attorneys' fees and costs.

IT IS SO ORDERED.

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s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

DATE January 4, 1996

APPENDIX C — FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, KNOXVILLE DIVISION FILED AUGUST 10, 1995

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

Civ. No. 3-92-737

MARILYN L. HUDSON,

Plaintiff,

v.

JANET RENO, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

Plaintiff Marilyn L. Hudson, a former Assistant United States Attorney ("AUSA") for the Eastern District of Tennessee, brought this action against the United States Attorney General and the Department of Justice ("DOJ") pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-16 *et seq.* ("Title VII"), the Equal Pay Act, as amended by the Fair Labor Standard Amendments of 1974, 29 U.S.C. § 206(d), and the Privacy Act, 5 U.S.C. § 552a. Plaintiff alleged that she had been discriminated against in her employment

on the basis of her sex and that she was retaliated against for complaining about the discrimination. In an amended complaint, Plaintiff alleged that she had been constructively discharged from her employment. Plaintiff also contended that defendants violated the requirements of the Privacy Act during an investigation of her alleged on-the-job misconduct.

Because the Civil Rights Act of 1991 provides for a jury trial, the trial of this case involved a jury determination of certain claims and a court determination of other claims. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). Plaintiff's Title VII claims of discrimination and retaliation occurring after the enactment of the Civil Rights Act of 1991, i.e., after November 20, 1991, including her claim of constructive discharge, were tried to a jury. The jury returned a verdict in favor of plaintiff, finding that defendants (1) had discriminated against the plaintiff on the basis of her sex during the period after November 20, 1991, and (2) had retaliated against the plaintiff during the same period because she made or pursued claims of employment discrimination against the defendants, and (3) that the plaintiff was constructively discharged from her employment because of her sex and/or in retaliation for her having made and pursued her claims of employment discrimination.

The jury awarded plaintiff $250,000 in compensatory damages for the sex discrimination, $500,000 in compensatory damages for the retaliation, and an additional $750,000 in compensatory damages for the constructive discharge. The court reduced the total amount of the jury award from $1.5 million to $300,000, pursuant to the statutory "cap" contained in the Civil Rights Act of 1991.

The court must now decide the Title VII claims of plaintiff arising out of events that occurred prior to November 21, 1991,

and the remedies to be accorded plaintiff if she prevails on these claims. In addition, the court must decide plaintiff's Privacy Act and Equal Pay Act claims and award appropriate damages if plaintiff prevails on such claims. Finally, the court must decide what, if any, equitable relief should be granted plaintiff, in addition to the compensatory damage award, to remedy the post-1991 Act violations of Title VII found by the jury. As part of its decision, the court must determine the amount of back pay and front pay which should be awarded to plaintiff to fully remedy the discrimination and retaliation, including the constructive discharge, which the jury found plaintiff suffered after November 20, 1991.

With regard to all these issues, the court makes the following findings of fact pursuant to Fed.R.Civ.P. 52 based on the evidence presented at trial, including its credibility determinations, and enters conclusions of law based on its findings and the relevant statutes and case law.[1]

Findings of Fact

1. Plaintiff Marilyn Hudson is a lawyer and member of the bar of Tennessee and New Jersey. She was hired by John Gill, then

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1. Although trial judges are encouraged to confirm their findings to a jury's verdict when the verdict determines issues commone to both claims, "[t]his rule is not ironclad." *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987). The court has an independent duty to make its own findings. *See Matthews v. CTI Container Transport Intern., Inc.*, 871 F.2d 270, 280 (2d Cir. 1989) ("We think the trial judge . . . was entitled to disregard the jury's fact-finding in reaching his conclusions concerning the liability of the United States. . . .") Here, the jury determined that discrimination and retaliation had occurred during a certain time period. The court must discharge its independent duty to determine whether discrimination and or retaliation occurred in a separate and distinct time period.

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U.S. Attorney for the Eastern District of Tennessee, on March 7, 1983, as an AUSA with responsibility for both criminal and civil cases.

2. Gill rated Hudson "excellent" for work performed as a line AUSA in 1986 and in 1987, and "outstanding" for work performed in 1988. Because Hudson was a line AUSA during this time period, Gill did not rate her on her supervisory or managerial skills.

3. In February 1989, Gill promoted Hudson to the supervisory position of Chief of the Financial Litigation Unit ("FLU"), although he had some concerns about the friction that existed between her and other AUSAs in the office. In November 1989, she was promoted by Gill to the position of Chief of the Civil Division of the U.S. Attorney's office for the Eastern District of Tennessee, a newly created supervisory position.

4. At approximately the same time that Hudson became the Chief of the Civil Division, Gill appointed James R. Dedrick as First Assistant U.S. Attorney for the office, the second-in-command position. Precariously, Dedrick had been the lead attorney of a drug enforcement unit in the U.S. Attorney's office.

5. Dedrick opposed Hudson's elevation to the Civil Chief position based on his observations that she did not complete cases in a timely fashion, did not deal with support staff in a forthright manner, and became angry over trivial matters. Gill was concerned about plaintiff's lack of ability to get along with other people in the office, but plaintiff assured him that this would not be a problem.[2]

2. Gill was only generally aware of FLU's operation at the time he promoted Hudson to be Civil Chief. Although he had received some positive feedback about plaintiff's work as Chief of FLU, a later Departmental review revealed several internal deficiencies. Loretta Barber, the AUSA who took over the collections part of the unit from plaintiff, testified that it was an internal disaster when plaintiff left.

6. Gill rated Hudson's supervisory performance as "outstanding" for the period from February 12, 1989, through April 10, 1990.[3]

7. Gill became aware that plaintiff was not performing satisfactorily as Civil Chief. Be observed her failure to revise workplans for employees she supervised which caused a delay in the employees' pay raises;[4] to complete paperwork regarding the hiring of contract personnel ("EBON" employees), although she was asked to do so many times;[5] to complete any meaningful work on her portion of a budgetary plan;[6] and to carry out the Department's "Garbage Out" program on purging old files and her false certification that the Civil Division was in compliance

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3. Although the dates typed on the evaluation show February 12, 1989, through June 30, 1990, as the rating period, Gill and Hudson's signatures are both dated April 10, 1990. Therefore, there is some confusion as to the time period actually rated by Gill. In light of the fact that plaintiff's next annual evaluation was for the rating period April 11, 1990, through April 10, 1991, it appear that the June 30, 1990, date is a typographical error. However, even if June 30, 1990, were the correct date, this would not change the court's ruling in any way.

4. Gill's testimony regarding the failure to revise the work plans was corroborated by Dedrick and by Sandy Dennis.

5. Gill's testimony regarding the EBON employee situation was corroborated by Dedrick and the documentary evidence in the record which showed that Hudson was asked to arrange for these employees but took no action.

6. Gill's testimony regarding the budget plan was corroborated by Dedrick and Dennis. Dedrick testified that he received an acceptable submission from every section chief except plaintiff on the budget plan, and Dennis testified that she had to rush to Federal Express to complete work that should have been done by plaintiff.

with that program.[7] Gill perceived other problems as well. Hudson failed to distribute work to the branch offices in Chattanooga and Johnson City; failed to provide guidance to line employees in the office; and failed to have the Civil Division staff assist with joint office functions, such as answering phones.

8. In January 1991, Gill was directed by the Executive Office for United States Attorneys ("EOUSA"), a unit within the DOJ which supports U.S. Attorney's offices, to submit the necessary paper work to obtain recently approved salary increases for the supervisors in the office, Hudson, Dedrick, and Curtis Collier, and for the senior litigation counsel, Mike Winck and Bob Simpson.

9. Gill forwarded the necessary paper work for Dedrick, Collier, and Winck, all males, to obtain salary increases but did not forward such paper work for plaintiff, a female, and Simpson, a male, because of their poor work performances. Consequently, Hudson and Simpson did not receive pay raises at that time. Dedrick, Collier, and Winck did receive pay raises.

10. Plaintiff was scheduled to receive an evaluation in January 1991, but Gill and Dedrick decided, instead, to place her on a 90-day improvement plan designed to let her correct the deficiencies in her job performance.[8]

7. Gill's testimony regarding Garbage Out was corroborated by Dedrick, Jarrette Jinnett, and Dennis.

8. The evidence refutes plaintiff's contention that she received the poor rating without any warning or prior counseling. Dedrick testified that he met with Hudson to notify her of the decision to place her on a 90-day performance improvement plan. His testimony is bolstered by the existence of contemporaneous handwritten notes he used during that meeting, in which he outlined the problems he saw in her performance. The items mentioned in these notes ("work plans"/"Ebon"/"Regular Meetings") conform to the problems recounted above.

11. During this 90-day period, plaintiff's performance did not improve. In fact, she refused the direct order of Gill to report to duty at the FBI office to take care of an important asset-forfeiture matter.

12. In May 1991, Dedrick obtained Gill's approval and gave Hudson a negative performance evaluation, one in which she was given an overall rating of "minimally satisfactory" for the period April 11, 1990, through April 10, 1991. Dedrick based his rating on the problems he perceived with her management of the Civil Division.[9]

13. When Hudson complained about the negative rating, Gill asked her to put in writing why she felt the rating was incorrect. He and Dedrick would then meet with her and her attorney to determine if the rating should be changed. Hudson did not follow through with Gill's offer.

14. Based on Hudson's reaction to the negative rating and her failure to evidence any desire to improve those areas which had

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9. Dedrick was critical of Hudson's running of the civil asset forfeiture program, her failure to revise employee work plans, her organization and operation of the debt collection program, her failure to obtain office assistants through the EBON program to assist with the asset forfeiture efforts, her untimely response to his request for budget information, her false certification that the civil files had been updated pursuant to the Garbage Out" program, her poor treatment of Greg Weddle, an AUSA on her staff, her failure to keep her superiors informed of the Civil Division operations and to be a "team player," and her insubordination when she refused to come to the FBI office in Knoxville as ordered by Gill. Dedrick addressed these concerns with Hudson orally but made only general references to them in the narrative section of the evaluation, e.g., "Improvements are needed in the development of a cooperative attitude in support of the entire office and management initiatives as well as the Civil Section."

been rated poorly, Gill and Dedrick decided to demote her from the Civil Chief's position.

15. On May 31, 1991, Hudson initiated the equal employment opportunity ("EEO") administrative complaint process within the DOJ alleging, inter alia, that Dedrick, with Gill's approval, had discriminated against her because of her sex in violation of Title VII by giving her the negative performance rating. When she later learned of the decision not to process her papers for the supervisory pay raise, Hudson added an Equal Pay Act claim to her EEO charge.

16. On June 1, 1991, Hudson mailed an administrative grievance to EOUSA in regard to the rating on her evaluation. Through the grievance process, the overall "minimally satisfactory" rating was eventually changed to an overall rating of "excellent" because of a technical deficiency in the original evaluation process. The reason given for the successful grievance was that plaintiff had not been provided with a formal progress review warning her of her deficiencies prior to her final rating.

17. On June 4, 1991, Hudson was demoted by Gill from the Civil Chief position and put into a line AUSA position to do criminal prosecution work without a reduction in grade-level or salary. On June 4, 1991, Gill and Dedrick were unaware that plaintiff had filed an EEO complaint or an administrative grievance.

18. After Hudson's demotion, at Gill's request and upon Dedrick's recommendation, the supervisory position designated as Civil Chief was abolished, and a Criminal Division Chief position was created. Steve Clark filled that position.

19. Hudson's pay remained at the same level after the demotion and, thereafter, increased when AUSA's pay increased generally, e.g., because of pay comparability adjustments and cost of living adjustments.

20. In the months following her removal from the position of Civil Chief and her transfer to the Criminal Division, plaintiff began openly criticizing Gill and Dedrick.

21. It was reported to Gill and Dedrick that plaintiff had: expressed an intention to strike back at the management of the office in statements to an FBI agent about her removal as Civil Chief; described Gill and Dedrick using expletives and called them liars;[10] and lied to Steve Clark, the Chief of the Criminal Division, about her leave status.

22. Gill requested that the EOUSA conduct an independent inquiry into plaintiff's alleged misconduct and the general situation in the U.S. Attorney's Office. Accordingly, Laurence McWhorter, Executive Director of EOUSA, sent EOUSA's Special Counsel, former U.S. Attorney John Volz, to investigate the situation.

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10. Steve Clark's testimony was supported by a contemporaneous memorandum outlining this misconduct. (Clark Memorandum: "On several occasions since Marilyn was reassigned to the Criminal Division, I have been present with others when Marilyn has described John Gill and Russ Dedrick by using expletives, has called one or both of them liars, and/or expressed great pleasure at John Gill's departure as United States Attorney.") Clark testified that Hudson made these remarks in public.

Even while plaintiff was Civil Chief, she referred to her supervisors in derogatory terms. One employee testified that plaintiff was in the habit of demanding "What the fuck does he want?" when Gill requested plaintiff's assistance.

23. Volz conducted interviews and prepared a report on his findings, which was ultimately transmitted back to McWhorter. Volz interviewed approximately 30 people about the allegations against Hudson before he interviewed Hudson herself.

24. In October 1991, several more allegations of misconduct by plaintiff were reported to Gill. These allegations included plaintiffs suggestion to a local defense attorney that he could obtain a more favorable result in a pending criminal matter if he waited until Gill left office and was replaced by United States Attorney-Designate Jerry G. Cunningham.[11]

25. Dedrick and Gill also based their request that Hudson be removed on her reported statement that "payback are hell," which they perceived as a threat to management. They also relied on what they considered to be a divisive statement by Hudson describing herself as a "trespasser" as she passed through the Civil Division on the way to her new office after her removal as Civil Chief. Hudson's insubordination as Civil Chief when she refused to come to the FBI office to work on a forfeiture matter as ordered by Gill and Dedrick was also presented as a justification for the proposed firing.

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11. Gill and Dedrick received reports that Hudson had advised Charles Burks, an attorney in private practice against whom she had recently tried and lost a criminal case, "not to try to resolve the case [another potential criminal charge against his client] until United States Attorney John Gill's successor had taken office," and that she had indicated to this lawyer that Gill and Dedrick "were seeking vengeance against his client and that his client's case would likely be resolved more favorably under the new United States Attorney."

26. After these allegations arose, and, in view of the other instances of alleged misconduct on plaintiff's part, Gill forwarded his request to EOUSA that plaintiff be terminated.[12]

27. After receiving Gill's request, McWhorter issued a letter to plaintiff informing her that he intended to seek the termination of her employment based on the charges of misconduct made by Dedrick and Gill and the investigation of those charges by his Volz. McWhorter's letter noted that, prior to making any recommendation to the Deputy Attorney General, plaintiff would have an opportunity to respond to the charges against her and that her reply would be considered before any further action was taken. McWhorter's letter also informed plaintiff that, pending review of her conduct, she would be placed on non-duty status, i.e., administrative leave, at full pay.[13]

28. The allegation concerning Hudson's remarks to Burks was the primary reason given by McWhorter for proposing Hudson's removal and for suspending her from her duties while she defended herself against a proposed removal action.

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12. The Director of EOUSA has been delegated authority to propose disciplinary actions against an AUSA, including removal, to the Deputy Attorney General. United States Attorneys may only recommend to the Director of EOUSA that such proposals be made. The Deputy Attorney General, acting directly for the Attorney General, is the only official empowered to terminate an AUSA and must review the record before doing so. The Director of EOUSA cannot make a recommendation to remove an AUSA to the Deputy Attorney General without first notifying the AUSA that he is considering such a recommendation and the basis of the proposed termination. The AUSA is given an opportunity to respond.

13. McWhorter testified that it is "fairly common" to place Departmental employees on paid leave, particularly when an office is factionalized, to give everyone in the office "breathing space."

29. On the afternoon of November 20, 1991, Gill delivered McWhorter's proposed termination letter to Hudson shortly before his departure from office and the swearing in of his replacement.

30. Hudson remained suspended from November 20, 1991, until February 1992. She continued to be paid during that period. The government rescinded Hudson's suspension from active duty status and abandoned the effort to terminate her employment at the request of Jerry Cunningham, the U.S. Attorney who replaced Gill.[14]

31. Hudson returned to work as an AUSA at her same grade and pay level.

32. Dedrick kept a file containing his notes of Hudson's activities. He showed Guy Blackwell, his successor as First AUSA, and Cunningham, the new U.S. Attorney, where his file on Hudson was kept. Dedrick's file contained his personal notes and were not retrievable under Hudson's name; rather, they were kept in a separately categorized "First Assistant's" file, which was kept in a locked drawer.

33. The jury found that Hudson had been constructively discharged on September 4, 1993. At that time, she earned $85,200 per year.

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14. McWhorter referred the charges of misconduct brought against Hudson that had formed the justification for the effort to terminate her emplyment to DOJ's Office of Professional Responsibility. OPR has not issued a decision on these misconduct charges.

34. After plaintiff was constructively discharged, she immediately went into private practice in Knoxville as a partner in the law firm of Ailor, Andrews & Hudson.

Conclusions of Law

In light of the evidence presented at trial and under the relevant statutes, regulations, and judicial precedent, the court hereby enters the following conclusions of law:

1. This court has subject matter jurisdiction over pre-November 21, 1991, claims of sex discrimination and retaliation brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-16 *et seq.*, pursuant to 42 U.S.C. § 2000e-16(c)(1), plaintiff having exhausted her available administrative remedies on such Title VII claims, and more than 180 days having passed since she filed her first formal administrative complaint (as amended) of employment discrimination on account of sex and retaliation with the appropriate office at the DOJ without the entry of a final administrative decision on said administrative EEO complaint. The court has subject matter jurisdiction over plaintiff's claims brought under the Equal Pay Act, as amended by the Fair Labor Standard Amendments of 1974, 29 U.S.C. § 206(d), pursuant to 29 U.S.C. § 216(b). The court also has subject matter jurisdiction over plaintiff's claims brought under the Privacy Act, as amended, 5 U.S.C. § 552a, pursuant to 5 U.S.C. 552a(g)(1). Moreover, the court has subject matter jurisdiction generally over the claims raised in the Amended Complaint pursuant to 28 U.S.C. § 1331(a).

2. Venue is proper in the Eastern District of Tennessee as plaintiff both resides and worked for the Department of Justice in this judicial district.

Appendix C

Sex Discrimination Claims

3. The standard for weighing and judging evidence in an employment discrimination case begins with the framework described by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *McDonnell Douglas* established a three-part test for allocating the burden of proof in the absence of intentional discrimination. First, the plaintiff must prove a prima facie case of discrimination by establishing:

> (i) that she belongs to a protected class; (ii) that she was qualified for the job that she held; (iii) that, despite her qualifications, she suffered an adverse employment decision; and (iv) that, after her rejection or demotion, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). After the plaintiff establishes a prima facie case, a presumption of discrimination arises, and the employer has the burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer is able to carry its burden, the burden returns to the plaintiff to prove that the reasons offered by the employer were merely a pretext for discrimination rather than the true reasons for the employer's actions. *Id.* at 804. The plaintiff always bears the ultimate burden of proving that her employer intentionally discriminated against her. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993); *Burdine*, 450 U.S. at 256.

4. If the employer succeeds in carrying its burden of production, i.e., articulating a legitimate, nondiscriminatory reason for its

action, then the *McDonnell Douglas* framework is no longer relevant, since the presumption of discrimination has been rebutted. *St. Mary's Honor Center*, 113 S. Ct. at 2747. Here, both parties, in their post-trial briefs, have spent considerable time arguing whether plaintiff established a prima facie case. However, there is no need for the court to consider this issue at this juncture since defendants have articulated nondiscriminatory reasons for their actions. Additionally, the court has already ruled that plaintiff established a prima facie case of discrimination in its order denying defendants' motion for judgment as a matter of law. Therefore, the issue for the court is whether plaintiff has shown that defendants' stated reasons were pretextual *and* that defendants took adverse actions against her because of her sex.

5. Plaintiff cannot meet her burden by "simply introducing evidence of discriminatory intent and suggesting that such intent could have played a role in an adverse employment decision. Rather, a plaintiff in required to demonstrate that the adverse employment decision would not have been made 'but for' her sex." *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir. 1988).

6. Plaintiff contends that the evidence warrants an inference of sex discrimination with regard to the decision to deny her a pay raise, the negative rating for the April 1990 to April 1991 performance period while she was Civil Chief, and her demotion as Civil Chief.

7. Defendants have articulated legitimate, nondiscriminatory reasons for their actions, and the court finds these reasons to be believable. It is clear that, when all the evidence is considered, the adverse personnel acts were not motivated by considerations of plaintiff's sex, but, instead, by Gill and Dedrick's belief that plaintiff was not performing her role as a supervisor adequately.

8. An employer has great flexibility in choosing or, in this case, retaining, a management-level employee because of the nature of such a position. *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987). Plaintiff's satisfactory job performance as a line attorney is not relevant to her performance as a supervisor. *See, e.g., Spangle v. Valley Force Sewer Authority,* 839 F.2d 171, 173 (3d Cir. 1988) (employee failed to present evidence that he was performing the managerial aspects of his job well, although there was no question that he performed the technical aspects of his job in a satisfactory manner); *Green v. Fairfax Co. School Bd.*, 832 F.Supp. 1032, 1038 (E.D.Va. 1993) (Even if [the employee] was technically proficient, [the employer's] reliance on the [the employee's] supervisory deficiencies in rejecting [her] for a position that placed a premium on supervisory and communications skills was nondiscriminatory.), *aff'd*, 23 F.3d 400 (4th Cir. 1994); *Perry v. Prudential Bache Securities*, 838 F. Supp. 843, 852 (D.N.J. 1989) ("While [plaintiff's] opposition papers are filled with evidence of the high calibre of his work as an underwriter, nowhere has he produced evidence to support a finding that he performed his supervisory obligations in a manner that was satisfactory to his employer"), *aff'd* 904 F.2d 696 (3d Cir.), *cert. denied*, 498 U.S. 948, 111 S. Ct. 386, 112 L.Ed.2d 397 (1990).

9. Gill's testimony about why he did not recommend plaintiff for the pay raise was credible as was Dedrick's testimony about his reasons for giving plaintiff the "minimally successful" rating and Gill's testimony about why he approved the rating. Their testimony about their reasons for demoting plaintiff was credible and showed that they had legitimate, nondiscriminatory reasons for believing that she was not performing her job satisfactorily. *See Wood v. Southwestern Bell Tel. Co.*, 637 F.2d 1188, 1192 (8th Cir. 1981) (Plaintiff was demoted due to her inability to perform the job satisfactorily, and not as the result of her sex.)

10. Plaintiff's testimony that she was performing satisfactorily as Civil Chief was not credible, especially in light of the specific instances of poor performance and misconduct cited by Gill and Dedrick and confirmed by other witnesses. However, even if plaintiff believed that she was performing adequately, that would not prove her case. *See Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1460 (7th Cir. 1994) (General averments of adequate performance, even when corroborated by statements of co-workers, are generally insufficient to rise a question of fact about an employer's honest assessment of inadequate performance.); *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992) ("An employee's self-serving statements about his ability . . . are insufficient to contradict an employer's negative assessment of that ability.") *See also Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1571 (7th Cir. 1568) ("The employee doesn't get to write his own job description. An employer can set whatever performance standards he wants, provided they are not a mask for discrimination . . . He can set unrealistic standards and fire an employee for not being able to meet them; he can . . . try to force a square peg into a round hole — and throw away the peg when it doesn't fit."); *Wrenn*, 808 F.2d at 502 (In a Title VII case, the court must look to the employer's motivation and not to the employee's perceptions of what qualifications are required for a particular position.)

11. Some of the many reasons articulated by defendants for their actions and which the court found to be credible were: plaintiff's failure to revise workplan for the employees under her supervision, to complete paperwork regarding the hiring of EBON employees, to complete her portion of a budgetary plan, and to carry out the Department's "Garbage Out" initiative on purging old files; plaintiff's false certification that the Civil Division was in compliance with the Garbage Out program; and plaintiff's failure

to stimulate asset forfeitures or to give help to others in this area, to distribute work to the branch offices, and to provide guidance to line employees in the office.

12. Perhaps of greatest significance in supporting her poor evaluation and subsequent demotion was plaintiff's refusal of Gill's direct order to report to duty at the FBI office. Although there was conflicting evidence as to whether plaintiff screamed and made an obscene gesture, there is no need for the court to resolve this conflict.[15] Plaintiff's refusal of the direct order, in and of itself, justified any detrimental action taken by Gill.

13. Plaintiff has asserted that Dedrick lacked the necessary experience in the substantive aspects of civil litigation matters to give her a fair evaluation. Whether or not this was true, Dedrick was critical only of plaintiff's managerial and supervisory skills in the evaluation.[16] And, Gill and Dedrick were both experienced enough to know that the behavior described above was disruptive to the office.

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15. Plaintiff contends that Greg Weddle's testimony supports her statement that she did not scream during her conversation with Dedrick. However, Weddle stated that he only overheard part of the conversation. Tonya White, a receptionist, testified that Hudson *did* make an obscene gesture. White viewed the gesture and plaintiff's tone as being "sarcastic".

16. Plaintiff asserts that Gill's previous rating of her for the first part of the period in which she was Civil Chief (overall: "Outstanding") tends to suggest that the rating she received from Dedrick (overall: "Minimally Satisfactory") was discriminatory. However the previous rating did not purport to measure the two categories in which she was subsequently rated as minimally satisfactory (i.e., "Initiative, Industry and Commitment" and "Managerial Ability") and, thus, is not probative of the motives for the subsequent rating on those elements.

14. A plaintiff may demonstrate pretext by showing: that the proffered reasons have no basis in fact, i.e., did not occur; that other employees, particularly employees outside the protected class, were not subject to adverse action, even though they engaged in similar behavior; or that the strength of the circumstantial evidence is so overwhelming that a discriminatory motive may be inferred. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994).

15. Plaintiff has presented no credible evidence that the events upon which Gill and Dedrick based their actions, especially the reports of misconduct from third parties, never occurred. Instead, she has tried to argue that Gill and Dedrick overreacted or misinterpreted her conduct. However, an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WACY Radio/Rahll Comm'ns,* 738 F.2d 1181, 1187 (11th Cir. 1984). Even if the court were to disagree with defendants' reasons for their actions or believe that they were unnecessarily harsh in their treatment of her, this would not be enough; an affirmative finding of discrimination must be made. *See Id.* (No discrimination even if plaintiff was fired for violating a rule he did not violate.) *See* also *Smith v. Stratus Commuter Inc.*, 40 F.3d 11, 16 (1st Cir. 1994) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision."); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (The court does not sit as a "super-personnel department. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers . . . our inquiry is limited to whether the employer gave an honest

explanation of its behavior.") *Accord McGruder v. Frank*, 825 F.Supp. 1300, 1310 (S.D. Ohio 1992) ("Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules. . . The issue in a discrimination case is not whether the basis on which the employer acted in taking a personnel action is 'sound'; rather, the issue is whether the reasons articulated by the employer are a pretext for discrimination."), *aff'd*, 995 F.2d 1067 (6th Cir. 1993).

16. The plaintiff bears the burden of showing that she was treated differently from other employees similarly situation. *Burdine*. 450 U.S at 258. Here, plaintiff has introduced no evidence that others outside the protected class engaging in similar acts were treated differently.[17] Accordingly, in order to sustain her ultimate burden of proof, plaintiff must show that the strength of the circumstantial evidence overwhelms defendants' articulated reasons. *Manzer*, 29 F.3d at 1083. Plaintiff has not met her burden.

17. After carefully considering the testimony of the witnesses and observing their demeanor, the court finds that the testimony of Gill and Dedrick was credible and persuasive. They observed plaintiff's work performance as a supervisor and determined that she was not performing adequately. This determination was not a pretext for discrimination but, instead, was their honest, subjective belief that she lacked the skills necessary for the Civil Chief position. *See Grano v. Dept. of Development of City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983) (Employing

17. The evidence showed that Gill did not forward the necessary paperwork for plaintiff and Bob Simpson to receive pay raises, although he did submit the necessary paper work for Dedrick, Collier, and Winck. Gill based his decision on the same criteria, i.e., quality of work, for both the males and the female who were eligible for the raise. His decision-making process resulted in three males receiving a raise and one female and one male not receiving a raise.

subjective evaluation does not, in itself, make an employment decision invalid. However, a closer scrutiny of the criteria used is required to make sure that it was not a mask for discrimination.) Plaintiff's proof merely showed that she performed well as a line attorney and that some people thought she performed well as a supervisor. She presented no proof that Gill and Dedrick were not honestly dissatisfied with her performance as a supervisor.

18. Plaintiff cannot rely on the revised rating as proof that her job performance was, in reality, acceptable. Although the two "Minimally Satisfactory" marks were subsequently raised to "Fully Successful" (resulting in the overall rating being raised to "Excellent"), the revision of the rating was due to a technical deficiency in the manner in which the office formally documented its mid-term review of plaintiff. Such a revision on technical grounds made no determination as to whether plaintiff's performance as it actually occurred was satisfactory.

19. In any event, a subsequent determination to raise this rating on technical grounds and the subsequent "Excellent" rating plaintiff received as a line attorney in the Criminal Division do not demonstrate pretext as to defendants' proffered reasons for removing plaintiff as Civil Chief. As the Sixth Circuit stated in response to a similar argument:

> The central theme of Manzer's argument is that, because he continued to receive good performance evaluations and merit pay increases even after the incidents which Diamond Shamrock cited as illustrative of his inaccuracy and combative attitude, those explanations must be incredible. This argument is misdirected. The issue is not whether Manzer was truly "obnoxious" enough, or "unreliable" enough, to

> justify firing him. Nor are we concerned with why Diamond Shamrock retained Manzer as long as it did. Those are precisely the type of "just cause" arguments which must not be allowed to creep into an employment discrimination lawsuit. Diamond Shamrock asserts that these are the reasons Manzer was fired and, in the absence of [a proper showing of pretext], its explanations must be accepted.

Manzer, 29 F.3d at 1085.

20. Plaintiff's credibility was impeached throughout the trial. For example, plaintiff testified that while she was Civil Chief, she was excluded from management meetings held between Gill, Dedrick, the Lead OCDETF Attorney (Winck) and the supervisory attorney in Chattanooga (Collier), after only two or three meetings. Yet, plaintiff took the opposite position in the internal grievance she filed with the Department concerning her April 1991 performance rating, maintaining: during most of the rating cycle, weekly meetings of the U.S. Attorney, First Assistant U.S. Attorney . . . OCDETF Lead Attorney [Mr. Winck] Chattanooga branch office supervisory attorney [Mr. Collier], and me were held."

21. Plaintiff has failed to carry her burden of proving that the challenged employment actions were the result of intentional sex-based discrimination by DOJ officials. Therefore, the defendants are found not to have violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 *et seq.*, for their actions prior to November 21, 1991.

Retaliation Claim

22. Hudson's retaliation claim is based on her contention that her removal from the Civil Chief position was motivated by her

having initiated a Title VII complaint of sex discrimination against Dedrick and Gill with respect to the 1990-1991 performance rating and her lawyer's statements to Gill about the poor appraisal. Hudson also contends that the investigation by Volz and her suspension from the U.S. Attorney's office on November 20, 1991, under a proposal to recommend her firing by the Director of EOUSA obtained at the urging of Dedrick and Gill, were acts of retaliation.

23. To establish a case of retaliation, a plaintiff must show: (a) that she engaged in a statutorily protected activity; (b) that the employer took an adverse personnel action against her; and (c) that a causal connection exists between her protected activity and the adverse action. *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990); *Prince v. Commissioner. U.S.I.N.S.*, 713 F.Supp. 984, 996 (E.D.Mich. 1989), citing *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C.Cir. 1984).

24. Hudson has not established a case of retaliation with regard to the treatment she received from Dedrick and Gill and the EOUSA after lodging her initial EEO claim. Although her filing of the EEO complaint was a protected activity and although defendants took adverse actions against her, plaintiff has not shown that a causal connection exists between the two.

25. Defendants have offered legitimate, nondiscriminatory reasons for each act that Hudson contends was an act of retaliation.

26. The evidence at trial showed that the decision to remove her was made before she filed her EEO and Departmental complaints. Hudson testified that, when she met with Dedrick about her performance evaluation on April 10, 1991, he asked her to resign

as Civil Chief. Dedrick testified that in May 1991, at the time it was decided that plaintiff would be removed as Civil Chief, he had no knowledge of any discrimination claim. Dedrick's testimony is confirmed by the documentary evidence, specifically a list of points he intended to use when briefing plaintiff about the removal of her duties as Civil Chief. This list establishes that Dedrick was trying to reach plaintiff to discuss her removal as Civil Chief several days prior to her EEO filing on May 31, 1991. Additionally, although undated, the document which outlined the steps that Hudson must take for a smooth transition from Civil Chief to line attorney in the Criminal Division specifies that "[o]n Tuesday, May 28, 1991, [Hudson] will conduct a complete file review with [Dedrick] for case reassignments." (emphasis added). Also, the initial EEO complaint itself states that the removal of duties had already been discussed with plaintiff. ("I have been issued a verbal warning threatening my removal from a supervisory position.")

27. Plaintiff also has asserted that Gill knew that plaintiff intended to file an EEO complaint on the disputed rating as a result of an April meeting with plaintiff's then-lawyer, Wanda Sobieski. Gill testified that Sobieski told him that Dedrick was treating plaintiff "unfairly" but he "didn't know she was going to file a complaint"

28. After plaintiff was transferred to the Criminal Division, she engaged in misconduct which ultimately led to the need for the investigation by Volz and her subsequent placement on paid administrative leave. The request by Gill that DOJ initiate and investigation and, ultimately, the decision to place plaintiff on administrative leave were the result of her misconduct, not her EEO activity.

29. After plaintiff's demotion, Gill and Dedrick received reports on plaintiff's misconduct. Almost immediately after the demotion,

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Dedrick learned of statements she made that he could reasonably have interpreted as being intended to disrupt the work place and threaten her supervisors. ("The cavalry's coming"; "If I don't get justice, I'll get revenge"). He later recorded incidents in which plaintiff stated: "Paybacks are hell" and "Announcement, announcement, the infiltrator is now entering the Civil Department." Although plaintiff asserts that these statements were made "lightheartedly" and were misinterpreted by Gill and Dedrick, her actual intent is not determinative. Instead, the court must look to Gill and Dedrick's interpretation of the statements.

30. It was also reported to Gill and Dedrick that plaintiff had: (1) expressed an intention to strike back at the management of the office by stating to an FBI agent about her removal as Civil Chief: "They fucked me; I'll fuck them"; (2) described Gill and Dedrick using expletives and had called them liars; and (3) lied to the Chief of the Criminal Division about her leave status.

31. The fact that defendant's actions were based on complaints from third parties is relevant to show their non-discriminatory intent. *Haddad v. Lockheed Corporation,* 720 F.2d 1454, 1456 (9th Cir. 1983. Considering this problem in the context of a hearsay objection, the *Haddad* court noted that the truth of the incidents was not at issue:

> Haddad also argues that the district court improperly admitted hearsay testimony by Lockheed management regarding third parties' complaints about working with Haddad. However, this testimony was not hearsay; it was not offered to prove the truth of the complaints. *See* Fed.R.Evid. 801(c). Instead, this testimony was offered to show that Lockheed management had received complaints regarding Haddad. Such

> testimony was relevant in demonstrating Lockheed's non-discriminatory intent in its employment practices. *See* Fed.R.Evid. 803(3). The court's admission of the evidence was not an abuse of its discretion . . .

Haddad, 720 F.2d at 1456.

32. Gill's request for an investigation of the incidents reported to him does not indicate a retaliatory motive, but rather a desire to ensure the orderliness and integrity of the work place. Gill testified as to the reasons he requested an independent investigation:

> We felt like it created more problems for Mr. Dedrick or myself to try and do an investigation as these things piled up. We thought it was important that there be some fact finding done by someone independent . . .

33. Volz testified that, over the course of his career as Special Counsel, he was sent not just to Knoxville, but to several different districts experiencing personnel problems. In Knoxville, the purpose of his visit was to "find out what the situation was" and "to find out what was causing all of the turmoil in this office." McWhorter confirmed that he sent Volz "to determine what was actually . . . going on and to advise me as to whether or not the office was able to maintain its ability to do the work of the U.S. Attorney."

34. Although plaintiff has suggested that it was improper for Dedrick to prepare a set of notes for Volz to use identifying some of the problem areas in the office prior to beginning his investigation, there is nothing suspicious about this. Volz needed some background as to the perceived problems.

35. Volz had been specifically instructed not to inquire about plaintiff's EEO complaint; therefore, he asked no questions about the complaint during his investigation.

36. Plaintiff has tried to make much of the concerns that some people in the office (her "supporters") experienced when they were interviewed by Volz. However, the subjective reactions of these employees are not relevant in determining Gill's motive in requesting an investigation, McWhorter's intent in sending Volz to the district, or Volz's intent in carrying out his assignment. As the Sixth Circuit has noted in a somewhat similar context, "a general increase of tension in the workplace would be expected to follow revelation that a claim of discrimination in employment had been filed." *Geisler v. Folsom,* 735 F.2d 991, 996 (6th Cir. 1984).

37. Plaintiff suggests that there was something suspicious in the fact that Volz "destroyed" his notes after he completed his interview. His explanation was believable: the notes were cryptic and of little value after the final report was prepared. Moreover, plaintiff has presented no evidence that Volz saved his notes in other cases.

38. Just as the Volz investigation was winding up, Gill and Dedrick learned of plaintiff's conversation with Charles Burks, a local defense attorney, regarding the prosecution of Charles and Evelyn Foust. Previously, Burks had secured an acquittal in a criminal tax case that plaintiff had prosecuted against the Fousts, but there was a possibility that a second prosecution, for bankruptcy fraud, would proceed. Burks described to Gill, Dedrick, and Michael Winck, another AUSA in the office, a meeting he had with plaintiff in which he felt that plaintiff was trying to discourage him from speaking with Gill or Dedrick concerning the resolution of the

potential second prosecution of the Faust case. Burks related that plaintiff had indicated that she was out of favor with Gill and Dedrick and that she could achieve a better result when Cunningham became U.S. Attorney. Burks was concerned that plaintiff was trying to stall resolution of the potential case against the Founts so that she could later double-cross Burks and convince Cunningham to prosecute them vigorously a second time.

Dedrick summarized what Burks told him in a contemporaneous memorandum:

> Burks stated that he was concerned because of deceptiveness on the part of Marilyn Hudson in the dealings that he had with her in the past and that he felt that she may be trying to deceive him so that she could exact a "pound of flesh" from his client after Cunningham became United States Attorney.

39. Gill asked Burks to put his concerns in a letter, which Burks did. Although the letter did not contain all of the details previously communicated to Winck, Dedrick, and Gill, it confirms that, as a result of his conversation with plaintiff, Burks feared that his clients would not receive fair treatment and that any further action against them would be "motivated in whole or in part out of a vendetta or retaliation as a result of the previous criminal trial." Most important, Burks' letter stated that he would like a meeting with the U.S. Attorneys Office to discuss the matter because he had received conflicting signals on how the U.S. Attorney's Office would proceed.[18]

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18. Burks did not testify, although his letter to Gill was admitted into eveidence. Hudson admitted talking to Burks about a possible aecond prosecution of the Fousts but denied telling him that he should wait and pursue the matter with the new U.S. Attorney.

40. Gill and Dedrick were concerned that plaintiff had attempted to inject her own personnel problems into a criminal matter and had suggested that the outcome could be determined not on the basis of a reasonable assessment of the evidence, but rather on the strength of her personal relationship with the U.S. Attorney.

41. At this point, having received reports from Dedrick and Winck and having spoken with Burks himself, and given plaintiff's conduct since her removal as Civil Chief, Gill felt that plaintiff's conduct warranted recommending her discharge to the Executive Office, which he did.[19]

42. In his letter to EOUSA, Gill listed five incidents of misconduct: (1) the Burks incident; (2) plaintiff's divisive comments in the office; (3) plaintiff's use of expletives and her reference to Gill and Dedrick as liars; (4) plaintiff's misrepresentations to Clark regarding her leave status; and (5) plaintiff's comments to an FBI Agent: "They fucked me; I'll fuck them." He explained his rationale for recommending discharge:

> [T]hese matters exhibited the difficulty we had with Ms. Hudson in the office of really undermining the function of the office and her insubordination and disruption in the office and outright wrongdoing in making these representations to Mr. Burks.

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19. Plaintiff asserts that it was inappropriate for Gill and Dedrick to deal with her misconduct in the office by proposing her removal because the U.S. Attorney's Manual required them first to refer the issue of her misconduct to the Department's Office of Professional Responsibility, and then take no further action. However, the U.S. Attorney's Manual does not forbid immediate corrective action. *See* 28 C.F.R. § 0.39a(a) (referral to OPR does not preempt primary responsibility of internal inspection units of DOJ to receive allegations and to conduct investigations).

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> I had Assistant United States Attorneys coming to me and saying that Marilyn Hudson was creating a climate of fear in the office by her indications that she would have all this influence when the new U.S. Attorney came in, and people were afraid of her. It was very disruptive.

He did not attempt to review the allegations on a point-by-point basis with plaintiff because:

> After the experience we had with her during the ratings, it became obvious that Mr. Dedrick — most of her complaints were directed toward Mr. Dedrick or myself. . . . It didn't appear to me that there would be anything to be gained by talking to her directly. The information that I was getting was looked into by Mr. Clark [Criminal Chief] and others and at that point I didn't feel there was anything to be gained . . . [20]

43. Subsequently, McWhorter made an independent assessment, with the assistance of legal counsel, and decided that the foregoing actions would, if true, warrant removal. He selected four of the incidents reported to him by Gill (the Burks matter; the statements to the FBI Agent; the references to Gill and Dedrick as liars and use of expletives toward them; and lying to Criminal Chief Clark

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20. In his testimony, Gill stressed that, at the time he made his recommendation, he had received reports from those whom he had no reason to doubt: "Mr. Dedrick, Mr. Clark, I did talk to various people in the office. Mr. Dedrick did talk to various people in the office. The situation with Mr. Burks, we all, Mr. Dedrick and myself both talked to Mr. Burks. We felt the information we received was reliable information."

about her available leave) and informed plaintiff that he was considering recommending her termination to the Deputy Attorney General in the absence of a credible explanation for her behavior. He also placed plaintiff on paid administrative leave pending a formal hearing.

44. Plaintiff has not shown that anyone else engaging in similar conduct would not have received similar treatment. *See Stotts v. Memphis Fire Dent.*, 858 F.2d 289, 294 (6th Cir. 1988) ("[I]t is the plaintiff's burden to prove that an employer intentionally 'treats some people less favorably than others because of their race, color, religion, sex, or national origin.' ") (citation omitted). As noted earlier, AUSAs were regularly placed on paid leave pending the resolution of a removal proposal. The application of the same discipline to others dispels a retaliatory motive.

45. The record confirms the careful manner in which Gill sought to collect information before acting, e.g., receipt of memo from Steve Clark detailing problems with Hudson such as her branding Gill and Dedrick as liars and using expletives; review with other managers of the incident involving Burks; speaking with Burks himself; and seeking help from EOUSA in obtaining an independent investigator to shield himself from allegations of bias.

46. Even when it became apparent that plaintiff might have to be terminated, the Department put her on paid leave and granted her the right to a hearing with her attorney before a final decision was made. No recommendation for termination would have been made to the Deputy Attorney General if plaintiff supplied an adequate explanation for her conduct. In fact, plaintiff's removal was never proposed to the Deputy Attorney General, she was returned to active duty at the request of Cunningham, and she lost no pay.

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47. While plaintiff makes much of the fact that the letter placing her on leave was delivered on Gill's last day in office, the record demonstrates that Gill had no control over the date he received the letter and, indeed, had thought it was going to be in his office two to three days earlier. When it did arrive, he felt it best that he himself deliver it, to avoid creating an immediate management problem for his successor. Thus, the timing of the letter does little to contradict defendants' motives.

48. Moreover, with respect to the entire retaliation claim, it is well-settled that an employer does not lose the ability to otherwise review an employee's conduct and, if necessary, discipline the employee, merely because the employee has filed a Title VII claim. *See Booker v. Brown & WIlliamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) ("An employee is not protected [under Title VII] when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals."); *Brown v. Ralston Purina Co.*, 557 F.2d 570, 572 (6th Cir. 1977) (Filing of an employment discrimination suit does not create any right on the part of an employee "to miss work, fail to perform assigned work, or leave work without notice"); *see also Hochstadt v. Worcester Foundation*, 545 F.2d 222, 230 (1st Cir. 1976) ("[A]n employee does not enjoy immunity from discharge for misconduct merely by claiming that at all times she was defending the rights of her sex by 'opposing' discriminatory practices. An employer remains entitled to loyalty and cooperativeness from employees.")

49. Not only were Gill and Dedrick credible in stating their reasons for the actions they took against plaintiff, but, also, at least seven women testified for defendants during the bench trial, all of whom directly contradicted plaintiff's testimony in some part. It is simply not believable that all of these women would commit perjury to

further a scheme to discriminate against another woman. Additionally, several males contradicted plaintiff's explanations of her conduct.[21]

50. Hudson makes much of the fact that her demotion, the Volz investigation, and her suspension all occurred within six months of Hudson having first alleged sex discrimination concerning Dedrick's "minimally successful" performance evaluation of her and after eight years of highly regarded service and job performance. However, the proffered justifications for the actions were credible. The evidence showed that Gill and Dedrick's actions were actually reactions to Hudson's poor performance as a supervisor and to her misconduct both before and after her demotion.

51. The principle that the factfinders' disbelief of the employer's justification for its action, coupled with a prime facie case, is sufficient to establish unlawful retaliatory intent, *St. Mary's Honor Center v. Hicks*, 113 S. Ct. at 2749, is not relevant in this case because the court, as the factfinder, believes the defendants' stated justification for their actions.

52. The reasons given to justify the government's course of conduct concerning Hudson from the date of her EEO complaint, May 31, 1991, up to and including her suspension on November 20, 1991, were supported by the evidence and, therefore, were not a pretext for retaliation.

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21. AUSA Guy Blackwell, a friend of plaintiff for at least ten years, corroborated Dedrick's testimony that plaintiff, when she was Civil Chief, failed to provide assistance and direction to AUSAs with complex civil cases and failed to assist with the decentralization program designed to send regional cases to the branch offices.

53. Although some of the charges preferred against Hudson were ultimately found to be inconsequential, the evidence showed that Gill and Dedrick had ample non-discriminatory reasons for their actions.

54. Not only has plaintiff not shown the proffered explanations to be a sham, but, more important, she has not shown that the only explanation for the alleged retaliatory conduct was the filing of her discrimination claim. *St. Mary's Honor Center*, 113 S. Ct. at 2751. She has failed to show that defendants' actions were tainted by a desire to harm her for suing the Department. *Manzer*, 29 F.3d at 1084.

55. The court concludes that the treatment accorded plaintiff after she first made her complaint of sex discrimination known and after she filed a formal charge of sex discrimination was not the result of intentional retaliation by DOJ officials against plaintiff for her having complained of sex discrimination, but, instead, was justified by Gill and Dedrick's perception of Hudson's performance in her job. Accordingly, the court finds that prior to November 21, 1991, defendants did not violate Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 *et seq.*

Back Pay

56. When an adverse personnel action instituted for impermissible reasons results in loss of wages, an award of back pay may be required. [22] This award should fulfill Title VII's dual purpose of

22. Section 2000e-5(g) of Title 42, made applicable to the government by Section 2000e-16(d), provides, in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court

(Cont'd)

eradicating discrimination and making the plaintiff whole. *Albemarle Pacer Co. v. Moody,* 422 U.S. 405, 421 (1975); *Reeves v. Claiborne County Bd. of Education,* 828 F.2d 1096 (5th Cir. 1987). Back pay is presumptively favored and should be awarded to successful employment discrimination plaintiffs absent special circumstances. *Gutzwiller*, 860 F.2d at 1333.

57. The proof showed that plaintiff was earning $85,200 per year at the time of her constructive discharge. Although the record indicated that plaintiff had mitigated her damages by going into private practice as an attorney, defendants presented no proof as to plaintiff's earnings so as to reduce the amount of back pay to which she is entitled. *Id.*

58. Consequently, back pay will be awarded to plaintiff at the rate of $85,200 per year from September 4, 1993, the date she was constructively discharged, through the date of this judgment.[23] The total amount of back pay awarded to Plaintiff is $16,330.96 which is based upon one full year from September 4, 1993, to September 3, 1994, and 339 days from September 4, 1994, to date.

(Cont'd)

> may . . . order such affirmative action as may be appropriate, which may include . . . reinstatement . . . with or without back pay . . . No order of the court shall require . . . reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other that discrimination on account of . . . sex.

23. Plaintiff has requested back pay from the date of her demotion as Civil Chief. However, since the court has found that the demotion was not the result of discrimination, she is only entitled to back pay fromt the date of her constructive discharge.

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59. Title VII authorizes prejudgment interest as part of the back pay remedy to ensure that the injured plaintiff is fully compensated. *Loeffler v. Frank*, 486 U.S. 549, 557 (1988); *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994). This circuit generally awards prejudgment interest in Title VII cases. *Wilson Metal Casket Co.*, 24 F.3d at 842. The rate of interest to be applied is within the discretion of the court. *E.E.O.C. v. Wooster Brush Co.*, 727 F.2d 566 579 (6th Cir. 1984). Although courts are not compelled to adopt the statutory postjudgment rate in determining prejudgment interest, this method has been approved by the Sixth Circuit. *Id. See* 28 U.S.C. § 1961. Accordingly, prejudgment interest will be added to plaintiff's back pay award at the interest rate of 5.70% which is the "rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment," i.e. July 20, 1995. 28 U.S.C. § 1961(a). The total amount of prejudgment interest equals $13,812.78.[24]

Front Pay

60. The jury determined that plaintiff was constructively discharged from her position as an AUSA. Plaintiff has asked for five years of front pay, a number she testified would generally reflect the length of time it took to build up her career as a prosecutor.

61. The court must now consider whether the equitable remedies of either reinstatement or front pay are necessary to recreate the

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24. Interest on Plaintiff's back pay for September 4, 1993, through September 3, 1994, ($85,200) equals $4,856.40. Interest on her back pay for September 4, 1994, through August 9, 1995, ($79,131.96 for 339 days) compounded on the back pay and interest for the previous year equals $8,956.39.

circumstances that would have existed for plaintiff absent the discrimination, i.e., make her "whole." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1396 (6th Cir. 1990).

62. Reinstatement is preferred to front pay, although it is not appropriate in every case. *Roush v. RFC Nat. Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993). "[R]einstatement is not a viable option, as in this case, when a non-culpable third party would be displaced, hostility exists between the parties, and, plaintiff has found other work. *Id. See Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985) ("[R]einstatement is an inappropriate remedy in this case. Shore's resumption of the . . . position would displace the person who has held the position since April, 1980. Additionally, the hostility which unfortunately exists between the parties precludes the possibility of a satisfactory employment relationship.") An employer's genuine dissatisfaction, with an employee's job performance is another factor to consider. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992). Since all these factors are present in this case, the court will not order reinstatement.

63. Next, the court must consider whether the remedy of front pay is appropriate. *Shore*, 777 F.2d at 1159.

64. The purpose of front pay is to put an injured party in the same position that party would have occupied in the absence of the discrimination, neither more nor less. *Griffin v. Michigan Dept. of Corrections*, 5 F.3d 186 (6th Cir. 1993); *Shore*, 777 F.2d at 1160.

65. Such an award is not considered an automatic remedy, but merely an additional equitable "make whole" tool which is "sometimes appropriate". *Shore*, 777 F.2d at 1159. Prior to

granting any front pay relief, the court must make a threshold determination as to whether any such remedy is necessary at all. *Roush*, 10 F.3d at 398.

66. The factors which the Court must consider in making the determination of whether to award front pay are: (1) whether the employee properly sought to mitigate damages; (2) the availability of other employment opportunities; and (3) the employee's work and life expectancy. *Roush*, 10 F.3d at 399.

67. Defendants have not seriously disputed that plaintiff met her burden to mitigate her damages when she went into the private practice of law immediately after her resignation from the U.S. Attorney's Office.

68. The record establishes that other employment opportunities would have been available to plaintiff. According to all the testimony, plaintiff is a skilled attorney to whom, *a fortiori*, many future employment opportunities should be available. *See Prichard v. Ledford*, 767 F.Supp. 1425, 1429 (E.D.Tenn. 1990) ("There is nothing in the record to indicate that [plaintiff] will not be able to obtain employment in the future which would be comparable to her job [with defendant]."), *aff'd*, 927 F.2d 605 (1991).

69. Although there is no evidence in the record concerning plaintiff's exact age, plaintiff appears to be relatively young, with approximately 20 years, or more, of earning power left. However, neither plaintiff nor defendants offered any evidence concerning plaintiff's life expectancy or work years expectancy. A number of courts have held that plaintiffs in their forties are too young for front pay awards. *See, e.g., Bailey v. Container Corporation of America*, 660 F. Supp. 1048, 1054 (S.D. Ohio 1986) ("[W]e

find that plaintiff was 41 years old at the time of his discharge, and has secured new employment. Those facts simply do not provide grounds for an award of front pay."); *Foit v. Suburban Bancorp.* 549 F. Supp. 264, 267 (D. Md. 1982) ("Moreover, the plaintiff's argument that at age 49 his number of employable years is limited is somewhat hard to swallow."); *see also Davis v. Combustion Engineering. Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) (noting that front pay for a 41 year old plaintiff until retirement "might be unwarranted").

70. Front pay is a temporary measure, designed to help a wrongfully discharged plaintiff over a "bridge period" between jobs. *See, e.g. Bailey,* 660 F. Supp. at 1054 (Front pay is designed to assist plaintiff during the period in which he can be expected to find other employment.); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) ("[F]ront pay is intended to be temporary in nature."), *cert. denied*, 484 U.S. 1047, 108 S. Ct. 785, 98 L.Ed.2d 870 (1988). In this case, there has been no proof that plaintiff needs financial assistance to help her bridge the gap between her former and present jobs.

71. Also bearing on the court's decision is plaintiff's failure to present proof that she makes any less in private practice than she did as an AUSA. Although the burden of proving failure to mitigate damages is on Defendants, Plaintiff has at least a threshold obligation to show that she lost *some* income as a result of the adverse action. *See Prunty v. Ark. Freightways, Inc.*, 16 F.3d 649, 652 (5th Cir. 1994) and *Horn v. Duke Homes,* 755 F.2d 599, 606 (7th Cir. 1985) (In an employment discrimination case, the plaintiff has the burden of proving her damages). Plaintiff has shown only that she earned $85,200 per year, that she lost her job, and that she gained other employment. There is no evidence in the record that the termination of plaintiff's federal employment

has caused her any loss of income. This lessens any claim plaintiff makes for front pay since its purpose is to close the gap between what plaintiff makes after being improperly removed and what she would have made in her former position had she not been removed. *See e.g., Shore* 777 F.2d at 1158. An award of front pay would, in essence, give plaintiff a windfall of having two salaries — one from her former position as AUSA and one from her present position as a practicing attorney in a private law firm.

72. Based on these factors, the court concludes that neither reinstatement nor an award of front pay are necessary in order to make plaintiff whole as a consequence of her constructive discharge.

The Equal Pay Act Claim

73. Plaintiff asserts that defendants violated the Equal Pay Act, 29 U.S.C. § 206(d) (1)[25] when Gill elected not to recommend her for a discretionary pay increase in January 1991.

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25. The Equal Pay Act, 29 U.S.C. § 206(d) (1), as applied to agencies of the United States, *see* 29 U.S.C. § 203(e) (2) (A) (ii), provides, in pertinent part:

> No employer . . . shall descriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the perfomance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

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74. In order to establish a prima facie case under the Equal Pay Act, a plaintiff must show that her employer paid lower wages to her than to a male who did equal work, the performance of which required equal skill, effort, and responsibility and which was performed under equal working conditions. *Corning Glass Works v. Brennan*, 417 O.S. 161, 195 (1974).

75. The employer then has the burden of showing that the wage differential was based on one of the exceptions enumerated in the statute, i.e., (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) any other factor other than sex. 29 U.S.C. §206 (d)(l). If the employer establishes that the differential is justified by one of the exceptions, the plaintiff must present evidence that proves that the proferred reason is pretextual. *Schwartz v. Florida Bd. of Regents,* 954 F.2d 620, 623 (11th Cir. 1991).

76. Hudson contends that after January 13, 1991, she was paid less than the other supervisors in her office based on her sex.

77. Gill and Dedrick testified that Hudson was denied the discretionary pay increase because her performance as a supervisor was only "minimally satisfactory." Although Hudson successfully grieved the rating that covered that period of time so that it was amended to an official rating of "excellent," Gill and Dedrick still perceived plaintiff's work as being deficient.[26]

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26. Plaintiff contends that the subsequent raising of her 1991 performance evaluation should have qualified her for a pay increase. Plaintiff's rating was changed upward due to a techinical deficiency in the rating process rather than a reversal of her Gill and Dedrick's views of her managerial ability and, therefore, she was not entitled to an automatic pay increase as a consequence of the rating change. Moreover, since the upgrade did not purport to make any substantive evaluation of plaintiff's performance, there was no reason to authorize the discretionary January 1991 pay increase based on the revised evaluation.

78. Hudson's job performance, rather than her sex, was the reason that Gill did not request a pay increase for her. Therefore, she was not entitled to receive a pay increase in January 1991, inasmuch as the decision to deny her an increase was based on her poor job performance ("a factor other than sex"). *See Schwartz*, 954 F.2d at 623 (Administrative duties, publications, research, supervision of doctoral students, and other performance areas are legitimate factors that can substantiate a pay differential outride of a formal merit pay system.)

79. Gill and Dedrick's credibility is bolstered by the fact that a male employee in the office who was entitled to an increase under the same Departmental pay memorandum was also denied the pay increase on performance grounds. Accordingly, plaintiff was not paid less than other employees performing comparable work because of her sex; she was paid less because her employers believed that she was not doing a good job.

80. The Equal Pay Act does not authorize a court to substitute its own judgment for that of an employer with regard to legitimate personnel decisions. *Girdis v. E.E.O.C.*, 688 F.Supp. 40, 46 (D.Mass. 1987), *aff'd*, 851 F.2d 540. A court must defer to the employer's decision as long as it is not based on considerations of the employee's sex. *Id.*

81. The court concludes that Hudson's failure to receive the pay increase was not because of her sex, but, instead, was based on a factor other than her sex. Therefore, defendants did not violate the Equal Pay Act.

Privacy Act Claims

82. Plaintiff has alleged numerous violations of the Privacy Act. First, plaintiff claims that defendants violated section 552a(e)(2)

of the Privacy Act during the investigation into her conduct by John Volz when he collected information about her by questioning others when such information could have allegedly been collected from Hudson herself.

83. Plaintiff further claims that, through his questioning, Volz spread false allegations of misconduct on plaintiff's part to each of those people interviewed, thus violating the Privacy Act by releasing information about plaintiff to those who are not authorized to receive such information. Similarly, plaintiff also alleges that in speaking to Jerry Cunningham and others outside government about her, Dedrick released information about plaintiff to those who were not authorized to receive such information, in violation of 5 U.S.C. §552a(b).

84. Additionally, plaintiff claims that Dedrick, Gill, Cunningham, and other employees of the U.S. Attorney's Office and the EOUSA violated the Privacy Act by establishing and maintaining a "secret," name-retrievable file about her and in using information in that file as a basis for personnel decisions concerning her.

85. Plaintiff further alleges that section 552a(d) of the Privacy Act was violated when the U.S. Attorney's office did not correct her 1990-1991 performance rating until June of 1992, although it was ordered changed in December 1991 as a result of the grievance decision. She also alleges that defendants refused to correct other information about her contained in her personnel file.

86. The Privacy Act of 1974 regulates the collection, maintenance, use, and dissemination of information concerning individuals. The Act attempts to strike a balance between the government's need to collect and maintain information and the

privacy interests of the persons to whom such information pertains. *DePlanche v. Califano*, 549 F.Supp. 685, 695 (W.D.Mich. 1982).

87. One purpose of the Privacy Act, which regulates the disclosure of, access to, and content of records kept by federal agencies concerning individuals, is to give those individuals greater control over the gathering, dissemination, and accuracy of agency information about themselves. *Miller v. United States*, 630 F.Supp. 347 (E.D.N.Y. 1986). Another goal of the Act is to protect information about an individual from being disclosed unnecessarily. *DePlanche*, 549 F.Supp. at 703.

88. Plaintiff alleges that defendants violated Section 552a(e)(2) of the Privacy Act when Volz collected information about her from persons other than herself during his investigation.

89. To maintain a claim under Section (e)(2), plaintiff must establish the following elements:

> (1) that the defendant failed to elicit information about plaintiff "to the greatest extent practicable" from plaintiff;
>
> (2) that the violation of the Act was intentional or willful; and
>
> (3) that defendant's actions had an adverse effect on plaintiff;

See 5 U.S.C. §§ 552a(e)(2); 552a(g)(4); 552a(g)(1)(D). A plaintiff must prove all of the foregoing elements to recover damages under the Act.

90. The decision to interview others before interviewing the subject of the investigation is supported by the Office of Management and Budget (OMB) guidelines for implementing the Privacy Act.[27] These guidelines indicate that third party sources may be contacted first when practical considerations, such as confirming or denying false statements by an employee, make contacting the employee first impracticable because doing so might provide the employee with the opportunity to sanitize a record or create falsely corroborative evidence. *See, e.g.,* 40 Fed. Reg. 28,948, 28,961 ("practical considerations . . . may dictate that a third party source . . . be used as a source of information in some cases . . . . [I]t may well be that the kind of information needed can only be obtained from a third party").

91. Here, practical considerations dictated that plaintiff's interview should be last. First, Volz testified that the information he had been provided indicated that plaintiff had made several false statements, including submitting a false certification regarding the Garbage Out program and submitting a false nomination form for a seminar. Volz stated that he felt it was important to conduct his investigation by checking the facts with others before interviewing the plaintiff, in order to ascertain the truth.[28]

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27. The OMB's authority to promulgate guidelines for implementing the Privacy Act is found in 5 U.S.C. § 552a(v)(1). The guidelines were promulgated contemporaneously with the Act's passage, and accordingly are entitled to deference in interpreting the statute's meaning. *See Zenith Radio Corp. v. Unitd States,* 437 U.S. 433, 450 (1978); *Martin v. Office of Special Counsel, MSPB,* 819 F.2d 1181, 1188 (D.C. Cir. 1987) ("Although the existence of [the OMB] interpretation alone would not settle the issue before us, it is worthy of our attention and solicitude . . . . OMB's interpretation makes our conclusion that much more certain.")

28. Volz stated, "Any inquiry or investigation you don't go to the person and say did you do these things because most of the time they are going to say, no, they didn't do them, I mean, if they are not very nice things, and you need to go to other people."

92. Furthermore, Volz felt it would have been impracticable to collect information regarding plaintiff's alleged factionalization of the office and intimidation of other employees by contacting the plaintiff first.[29] Volz believed that plaintiff would try to harass or intimidate other employees whom she thought might report adversely on her management style. *See Brune v. I.R.S.*, 861 F.2d at 1287 (internal investigator for Internal Revenue Service not obligated to contact employee first where possibility exists, that employee could intimidate third parties).

93. Additionally, defendants believed that interviewing plaintiff last lessened the opportunity for plaintiff to dissemble or disrupt the office and ensured the fairest process for plaintiff by giving her a chance to respond fully to all the matters Volz discussed with others.

94. In any event, neither Volz nor EOUSA intentionally or willfully violated plaintiff's rights under the Privacy Act. *Henson v. NASA*, 14 F.3d 1143, 1149 (6th Cir. 1994) ("In order to receive damages, the plaintiff must prove that the government's actions were intentional or willful.") The Act indicates that this standard was intended to "require a showing of fault something greater than gross negligence." *Kostyu v. U.S.*, 742 F.Supp. 413, 416 (E.D.Mich. 1990). *See, also, Moskiewicz v. Dept. of Agric.*, 791 F.2d 561, 563 (7th Cir. 1986); Analysis of House and Senate Compromise Agreements to the Federal Privacy Act, 120 Cong. Rec. 40405, 40406 (1974). As the Tenth Circuit explained:

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29. Volz testified: "Secondly, you need to make sure that you did everything you can to keep that person from either intimidating other people, potential witnesses and I felt that there was a tremendous potential for that in this matter . . . That treats had been made, you are either with me or you are against me . . . I knew from speaking to other people that she was prone to be very combative to people who she perceived not to be on her side."

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> [T]he term "willful or intentional" clearly requires conduct amounting to more than gross negligence. We are persuaded by the District of Columbia Circuit's definitions of willful or intentional that contemplate action *"so 'patently egregious and unlawful'* that anyone undertaking the conduct should have known it 'unlawful,' " . . . or conduct committed 'without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act," . . . and add the view expressed [by the Seventh Circuit] that the conduct must amount to, at the very least, *reckless behavior.* Those, and similar definitions, describe conduct more extreme than gross negligence.

Andrews v. Veterans Admin. of United States, 838 F.2d 418, 425 (10th Cir.) (emphasis added; citations omitted), *cert. denied*, 488, 817, 109 S.Ct. 56, 102 L.Ed.2d 35 (1988). The intentional or willful standard of 552a(g)(4), therefore, does not encompass "all voluntary actions which might otherwise inadvertently contravene one of the Act's strictures." *Albright v. United States,* 732 F.2d 181, 189 (D.C. Cir. 1984).

95. Here, even if the Privacy Act required Volz to interview plaintiff first, there is no evidence that Volz or anyone in the EOUSA willfully attempted to violate plaintiff's rights. McWhorter testified that he did not instruct Volz to conduct his investigation in any particular manner, and Volz testified that he was not aware of the Privacy Act's requirements at the time he conducted his interviews.

96. Any violation of the Privacy Act that resulted from the order in which Volz conducted his interviews was at most inadvertent.

97. Next, plaintiff maintains that Dedrick kept a "secret" file on her which contained false information in violation of the section of the Privacy Act governing the maintenance of, and access to, employee files.[30]

98. Dedrick's file contained his personal notes concerning Hudson and were not retrievable under anyone's name; rather, they were kept in a separately categorized "First Assistant's" file, which was itself kept in a locked drawer. As such, it was not part of a formal, name-retrievable "system of records" under formal agency control and, therefore, was not subject to the Privacy Act.[31] Dedrick had no duty to put his personal notes into a system of records. *Manuel v. Veterans Admin. Hosp.*, 857 F.2d 1112, 1117-18 (6th Cir. 1988).

99. Even if the file was subject to the Privacy Act, however, no improper disclosure occurred. Shortly after Dedrick left the First AUSA position in November 1991, he turned over the file to his

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30. The Privacy Act provides that each agency that maintains a formal "system of records" concerning a person shall make the same available for inspection and review. 5 U.S.C. § 552a(d). A "system of records" is a highly defined term of art, referring to a formal "name-retrievable" set of documents. 5 U.S.C. § 552a(a)(5).

31. 5 U.S.C. § 552a(a)(5); *see Manuel v. Veterans Admin. Hosp.*, 857 F.2d at 1117, 1119 (holding that the Privacy Act only applies to records placed in a system of records and not to documents that arguably should have been placed in a system of records but were not), *cert. denied*, 489 U.S. 1055, 109 S.Ct. 1317, 103 L.Ed.2d 586 (1989); *see also Kalmin v. Department of Navy*, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985); OMB Guidelines, 40 Fed. Reg. 28,948, 28,952 (1975) ("Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records.")

successor as First AUSA, Guy Blackwell. This "disclosure" for purposes of preserving the file in view of pending litigation, or otherwise informing plaintiff's supervisor of its contents, falls within the "need to know" exception to the Privacy Act,[32] which authorizes the intra-agency disclosure of a record "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties . . . ."[33]

100. Plaintiff also alleges that the Department did not properly correct her 1990-1991 performance evaluation and improperly disclosed the same within the office.

101. Plaintiff's claims for access to, and amendment of, any files pertaining to her fall within the purview of 5 U.S.C. § 552a(g)(1)(A) and (B), which entitle plaintiff to injunctive relief only. This court previously dismissed all of plaintiff's claims for

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32. The Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ". 5 U.S.C. § 552a(b). The Act makes an exception for disclosures "to those officers and employees of the agency which maintains the record who have need for the record in performance of their duties." 5 U.S.C. § 552a (b)(1).

33. 5 U.S.C. 5 552a(b)(1); *see Krowitz v. Dept. of Agric.*, 641 F. Supp. 1536, 1545 (W.D. Mich. 1986) (no violation when employee's unsatisfactory performance status was disclosed to other personnel who were assigned to assist him), *aff' d*, 826 F.2d 1063 (6th Cir. 1987), *cert. denied*, 484 U.S. 1009, 108 S.Ct. 705, 98 L.Ed.2d 656 (1988); *see also*, *Hernandez v. Alexander*, 671 F.2d 402, 410 (10th Cir. 1982); *Howard v. Marsh*, 785 F.2d 645, 648 (8th Cir.), *cert. denied*, 479 U.S. 988, 107 S.Ct. 581, 93 B.Ed.2d 584 (1986); OMB Guidelines, 40 Fed. Reg. at 28,950 (recognizing propriety of "need to know" disclosures among Justice Department components).

injunctive relief for failure to exhaust her administrative remedies. Therefore, plaintiff may not proceed further with these claims.[34]

102. To the extent that plaintiff seeks to alter the records and, thus, amend the judgment of her supervisors as to her abilities, her claim must fail. The Privacy Act allows for the amendment of factual or historical errors, but it is not a vehicle for amending the judgment of federal officials as that judgment is reflected in the records maintained by federal agencies. *Kleiman v. Dept. of Energy*, 956 F.2d 335, 337-38 (D.C. Cir. 1992); *Hewitt v. Grabicki*, 794 F.2d 1373, 1378 (9th Cir. 1986). *See also Castella v. Long*, 701 F. Supp. 578, 584-85 (N.D. Tex.) ("[C]ollateral[ ] attack [on] the correctness of the finding supporting the discharge decision" was improper under the Privacy Act), *aff'd*, 862 F.2d 872 (5th Cir. 1988).

103. Plaintiff has complained that defendants waited until June 1992 to correct the performance evaluation that she had successfully grieved, even though they were instructed to make the corrections in December 1991. The proof showed that, during this six month period, Rodney Shropshire, the administrative

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34. Courts have uniformly held that plaintiffs under the Privacy Act must exhaust the administrative process before seeking judicial review of their claims. *See, e.g., Cahill v. Marsh*, 902 F.2d 1006, 1007-08 (D.C. Cir. 1990) ("The proper means by which to seek a substantive change in [plaintiff's] military records . . . was through a proceeding before the Army Board for the Correction of Military Records."); *Haase v. Sessions*, 893 F.2d 370, 373-74 (D.C. Cir. 1990) ("P]laintiff, according to the statutory language, must initially seek an amendment or access from the agency and even seek review within the agency before coming to court."); *Reyes v. Supervisor of the Drug Enforcement Admin.*, 834 F.2d 1093, 1097 (1st Cir. 1987) ("[Plaintiff] is properly required to avail himself of the administrative procedures."); *Germane v. Heckler*, 804 F.2d 366, 369 (7th Cir. 1986) ("[Plaintiff] may [not] ignore administrative remedies because they would not result in the relief she desires.

officer whose duties included the maintenance of all employee personnel files, was communicating with EOUSA on how to make the necessary corrections. The first attempt at correcting the document was inadequate, and permission was sought to have the document retyped.

104. Plaintiff has failed to show that there were any unwarranted disclosure of her performance evaluation, which was regularly locked in Shropshire's office. Sandy Dennis had typed plaintiff's evaluation originally and, to prevent the unnecessary involvement of additional people, she was assigned to make corrections to the performance evaluation pursuant to the grievance ruling. This "disclosure" for the purpose of complying with an administrative ruling is also authorized under the "need to know" exception of the Privacy Act, 5 U.S.C. § 552a(b)(1).

105. Moreover, plaintiff has failed to show that she suffered any adverse effects as a result of the delay in the correction process, which her supervisors were aware was underway and which was ultimately accomplished.

106. Cunningham's letter to Hudson about her misconduct which was sent to EOUSA for approval did not violate the Privacy Act, nor did its disclosure to her other supervisors. Steve Clark, plaintiff's immediate supervisor, had a particular need to know about any problems with her performance.

107. Hudson herself publicized the letter from Cunningham when she showed it to Pamela Steele, another AUSA in the office. *See FDIC v. Dye,* 642 F.2d 833, 836 (5th Cir. 1981) and *Ring v. Califano,* 471 F. Supp. 180, 181 (D.D.C. 1979) (Release of previously published information is not a Privacy Act disclosure.)

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108. Plaintiff complains that defendants "spread rumors" about her, specifically when Volz interviewed witnesses during his investigation and when Gill and Dedrick informed Cunningham about plaintiff's alleged misconduct. The record reflects that Volz received information from the witnesses rather than disseminating it. He released no information other than that necessary to frame his questions.

109. Gill and Dedrick kept Cunningham apprised of the happenings in the U.S. Attorney's Office because it appeared that he would succeed Gill at any time. Be certainly had a need to know about the conduct of one of his future employees an it related to his management of the office. He made no adverse determination about plaintiff based on this information.[35] Instead, he actively worked for the termination of her suspension and her return to work beginning the first day he became U.S. Attorney.

110. Furthermore, there has been no proof that this information came from a "system of records." The Privacy Act only prohibits the disclosure of information that has been retrieved from a system of records. *Wilborn v. Dept. of HHS*, 49 F.3d 597, 600 (9th Cir. 1995). The "spreading of rumors" is more closely akin to office gossip than to the disclosure of records protected by the Privacy Act. *See Beaulieu v. U.S.A.*, 865 F.2d 1351, 1352 (1st Cir. 1989).

111. For the reasons discussed above, the court finds that defendants did not violate the Privacy Act in any of the instances cited by plaintiff.

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35. Although he stated that some of the information he had received might have had an effect on his decision not to return plaintiff to the Civil Chief position, he also stated that he did not make her Civil Chief because he had only one supervisory position and needed a Criminal Chief and, also, the other staff did not respect her.

Appendix C

Relief

ACCORDINGLY, based on the above findings of fact and conclusions of law, the court orders the following relief:

(a) judgment will be entered for Plaintiff on the jury verdict under Title VII, of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 for claims arising after November 20, 1991;

(b) judgment will be entered for defendants on plaintiff's Title VII claims of sex discrimination and retaliation for the period prior to November 21, 1991;

(c) judgment will be entered for defendants on plaintiff's claims under the Equal Pay Act;

(d) judgment will be entered for defendants on plaintiff's Privacy Act claims;

(e) although the jury determined plaintiff's compensatory damages for the Attorney General's violations of Title VII's proscriptions against discrimination and retaliation, including discriminatory/retaliatory constructive discharge, to be $1,500,000, the statute limits recovery to $300,000 and plaintiff is, therefore, awarded compensatory damages in the amount of $300,000, plus interest from the date of judgment thereon, on her post-November 20, 1991, Title VII claims;

(f) defendants are ordered to provide plaintiff with full back pay, with prejudgment interest thereon, from September 4, 1993, through the date of this judgment. The back pay amount totals $164,330.96, and the prejudgment interest totals $13,812.78. The

total judgment awarded Plaintiff for compensatory damages, back pay, and prejudgment interest is $478,143.74;

(g) defendants are ordered to credit and/or restore plaintiff's annual leave and sick leave that would have been accrued from September 4, 1993, through the date of payment of all back pay due hereunder; and to pay her for all such restored annual and sick leave at the salary level she would have had during that time as an AUSA;

(h) defendants are ordered to correct all records, including plaintiff's official personnel folder, to reflect the relief ordered by the court;

(i) defendants are permanently enjoined from discriminating or retaliating against plaintiff in the future; and

(j) plaintiff is awarded her costs of this action and reasonable attorney's fees, pursuant to 42 U.S.C. § 2000e-5(k), 29 U.S.C. § 216(b) and 5 U.S.C. § 552a(g)(4)(B). Plaintiff will have thirty days from the entry of this order in which to submit documentation as to the amount of the attorney's fees which she contends that she reasonably incurred in this action. Defendants will then have thirty days in which to respond to plaintiff's documentation. Pursuant to Fed.R.Civ.P. 58 and Fed.R.App.P. 4(a)(4), the time for appeal for all parties shall run from the entry of the order which disposes of the attorney's fee issue.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE
DATE: August 9, 1995

APPENDIX D — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE FILED AUGUST 17, 1995

United States District Court

EASTERN DISTRICT OF TENNESSEE

CASE NUMBER: 3:92-CV-737

MARILYN L. HUDSON

V.

JANET RENO, et al.

JUDGMENT IN A CIVIL CASE

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that a judgment be entered for Plaintiff, MARILYN L. HUDSON on the jury verdict under Title VII, of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 for claims arising after November 20, 1991. Judgment will be entered for defendants on plaintiff's Title VII claims of sex discrimination and retaliation for the period prior to November 21, 1991, on plaintiff's claims under the Equal Pay Act and on plaintiff's Privacy Act claims. Plaintiff is awarded compensatory damages in the amount of THREE HUNDRED

Appendix D

THOUSAND DOLLARS AND 00/100 ($300,000.00), plus interest from the date of judgment thereon, on her post-November 20, 1991, Title VII claims; back pay in the amount of ONE HUNDRED SIXTY-FOUR THOUSAND THREE HUNDRED THIRTY-THREE DOLLARS AND 96/100 ($164,330.96), prejudgment interest of THIRTEEN THOUSAND EIGHT HUNDRED TWELVE DOLLARS AND 78/100 ($13,812.78) with a total judgment awarded to Plaintiff, MARILYN L. HUDSON in the amount of FOUR HUNDRED SEVENTY-EIGHT THOUSAND ONE HUNDRED FORTY-THREE DOLLARS AND 74/100 ($478,143.74), plus any other amount accrued in Plaintiff's annual leave. Plaintiff is awarded her costs of this action and reasonable attorney's fees.

8/17/95
Date

R. MURRY HAWKINS
Clerk

s/ Yvonne Arwood
(By) Deputy Clerk, Yvonne Arwood

APPENDIX E — ORDER ON JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF TENNESSEE AT KNOXVILLE FILED OCTOBER 24, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. 3:92-cv-737

MARILYN L. HUDSON,

Plaintiff,

vs.

JANET RENO, Attorney General of the United States of America,

-and-

THE UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

ORDER ON JURY VERDICT

This action came on to be heard before the court and a jury on September 26, 1994. After hearing the evidence, arguments of counsel, and charge of the court, on October 13, 1994, the jury retired to begin its deliberations as to the issues submitted to it, namely, sex discrimination occurring after November 20, 1991, retaliation which occurred after November 20, 1991, and constructive discharge. After due deliberation, the jury returned

to open court on October 14, 1994, and reported the following answers to the questions submitted to the jury:

1. Did defendants discriminate against plaintiff on the basis of her sex or gender?

YES _X_ NO ____

2. What amount of compensatory damages did plaintiff sustain as a result of that discrimination?

AMOUNT $250,000

3. Did defendants retaliate against plaintiff because she made and/or pursued claims of employment discrimination against defendants?

YES _X_ NO ____

4. What amount of compensatory damages did plaintiff sustain as a result of that retaliation?

AMOUNT $500,000

5. Was plaintiff constructively discharged by defendants either because of plaintiff's sex or gender or because she made and/or pursued claims of employment discrimination?

YES _X_ NO ____

6. What amount of compensatory damages did plaintiff sustain as a result of that constructive discharge?

AMOUNT $750,000

Forty-two U.S.C. § 1981(a)(b)(3)(D) provides: "The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses . . . shall not exceed, for each complaining party . . . $300, 000."

Therefore, plaintiff's recovery on the issues submitted to the jury under 42 U.S.C. § 1981(a) is limited to the sum of $300,000.

The remaining issues which were not submitted to the jury were taken under advisement by the court. Specifically, the court took under advisement the issues of sex discrimination occurring prior to November 21, 1991; issues of back pay, front pay, and equitable relief; issues under the Privacy Act, and issues under the Equal Pay Act. The parties were instructed to submit written arguments on those issues, with plaintiff's initial written argument due 30 days after receipt of a transcript of testimony, defendants' response being due 20 days thereafter, and plaintiff's reply being due 10 days later.

Appendix E

Entry of judgment will be withheld until the non-jury issues are resolved.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

October 18, 1994
Date

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 10, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-5232

MARILYN L. HUDSON,

Plaintiff-Appellant,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES AND UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

BEFORE: KRUPANSKY and SUHRHEINRICH, Circuit Judges; and ROSEN,* District Judge.

ORDER

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

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*Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix F

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
AUG 10 1998
CLERK

No. 97-1987

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARILYN L. HUDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(3), which limits to certain sums the compensatory damages that may be awarded "in an action brought by a complaining party" under Title VII, limits the total of compensatory damages per lawsuit that may be awarded to a plaintiff, or rather operates as a cap on an award on each claim brought by a party in a Title VII suit.

2. Whether petitioner was entitled to front pay as a remedy for the post-November 20, 1991, violations of Title VII found by the jury.

3. Whether the district court abused its discretion in awarding attorney's fees to petitioner at market rates prevailing in Knoxville, Tennessee, where the trial in this case took place, rather than the Washington, D.C., rates charged by petitioner's counsel, or in disallowing certain of petitioner's claims for attorney's fees that were based on duplicative effort and time spent on issues on which petitioner did not prevail.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1987

MARILYN L. HUDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 130 F.3d 1193. The opinion of the district court on the merits of petitioner's claims under Title VII before the statute's amendment on November 21, 1991 (Pet. App. 76a-129a) and its opinion awarding attorney's fees (Pet. App. 35a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1997. A petition for rehearing was denied on March 10, 1998. Pet. App. 136a-137a. The petition for certiorari was filed on June 8, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former Assistant United States Attorney (AUSA) in Knoxville, Tennessee, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioner alleged that the Department of Justice had engaged in sex discrimination and unlawful retaliation against her with respect to her employment. With respect to petitioner's claims based on conduct before the November 21, 1991, amendment of Title VII, the district court found that no unlawful conduct had occurred. Pet. App. 76a-129a. With respect to her claims based on conduct after November 20, 1991, the jury found in petitioner's favor, and awarded her $1.5 million in compensatory damages. *Id.* at 133a-134a. The district court reduced that damages award to $300,000. *Id.* at 128a, 134a. It also awarded petitioner $164,330.96 in back pay, *id.* at 128a-129a, but disallowed any remedy of reinstatement or front pay, *id.* at 111a-115a. The district court then awarded $430,752.28 in costs and attorney's fees, *id.* at 74a, after rejecting certain of petitioner's claims for fees, *id.* at 45a-71a. The court of appeals affirmed. *Id.* at 1a-34a.

1. Petitioner was hired as an AUSA for the Eastern District of Tennessee in 1983 by then-United States Attorney John W. Gill, Jr. At about the same time, Gill also hired as an AUSA James R. Dedrick, who later became First Assistant U.S. Attorney. Petitioner was promoted to a supervisory position in February 1989, and was again promoted in November 1989 to Chief of the Office's Civil Division. Pet. App. 3a. Until April 1990, petitioner's performance was

rated as "outstanding," but during 1990 and 1991, her superiors became dissatisfied with her management performance. *Id.* at 3a-4a. In January 1991, Gill and Dedrick put petitioner on a 90-day performance improvement plan. *Id.* at 4a. In May 1991, after petitioner had failed to improve her management performance, Dedrick and Gill gave petitioner a "minimally satisfactory" performance evaluation as Chief of the Civil Division. *Id.* at 4a, 79a-82a.

On May 31, 1991, petitioner initiated an administrative equal employment opportunity (EEO) complaint within the Department of Justice. Unaware that petitioner had filed an EEO complaint, Gill and Dedrick demoted petitioner from her position as Chief of the Civil Division and transferred her to a non-supervisory position in the Criminal Division (although she was still compensated at her supervisory pay level). Pet. App. 4a. After her demotion, petitioner expressed an intention to "strike back" at the management of the Office, openly and harshly criticized her superiors (referring to them as liars and using expletives to describe them), and lied to the new Chief of the Criminal Division about her leave status. *Id.* at 84a. Based on reports of this conduct, Gill wrote to Laurence S. McWhorter, Director of the Executive Office of United States Attorneys (EOUSA) in Washington, D.C., on November 13, 1991, recommending petitioner's removal from employment and her immediate placement on administrative leave pending a final decision on her employment status. EOUSA concurred in the recommendation, and, on November 20, 1991, petitioner was given a letter from McWhorter placing her on administrative leave, advising her that McWhorter was considering proposing her removal to the Deputy Attorney General

on the grounds suggested by Gill, and affording her an opportunity to respond to the charges against her in advance of McWhorter's recommendation to the Deputy Attorney General. *Id.* at 86a.

In February 1992, after replacing Gill as the U.S. Attorney, Jerry G. Cunningham interceded with EOUSA on petitioner's behalf and ultimately was able to have petitioner returned to duty status. Cunningham also replaced Dedrick with Guy Blackwell as First Assistant U.S. Attorney. Pet. App. 39a-40a. In June 1992, Cunningham sent petitioner a memorandum detailing instances of her misconduct since she had returned to duty, including lack of truthfulness, unauthorized removal of documents, failure to report for work, and unprofessional and divisive conduct. *Id.* at 6a.

In May 1993, Cunningham left office. In August 1993, petitioner learned that Dedrick would be reappointed as First Assistant once Cunningham's replacement, Carl Kirkpatrick, was sworn into office. Pet. App. 7a. Petitioner then resigned, effective September 4, 1993, and immediately went into private practice as a partner in the firm of Ailor, Andrews & Hudson in Knoxville. *Ibid.*

2. On December 11, 1991, petitioner filed a "petition" in district court, which alleged sex discrimination and unlawful retaliation in violation of Title VII, and requested an order barring the U.S. Attorney from suspending her from employment as an AUSA. On December 11, 1991, the court granted a temporary restraining order (TRO) pending a preliminary injunction hearing, which it indefinitely continued. Pet. App. 6a.

On October 27, 1992, petitioner filed another complaint in district court, which again alleged sex dis-

crimination and retaliation, and sought damages under the Civil Rights Act of 1991. By order entered December 21, 1992, the original "petition" and the action for damages were consolidated. Pet. App. 6a-7a. On August 30, 1993, the court of appeals reversed the district court's indefinite continuation of the TRO and remanded for proceedings on petitioner's request for an injunction, but that request became moot when petitioner resigned her position. *Id.* at 6a; *Hudson* v. *Barr*, 3 F.3d 970, 973-976 (6th Cir. 1993). In October 1993, petitioner amended her complaint to include a claim for constructive discharge and front pay. Pet. App. 7a.

3. Following this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the district court determined that petitioner's claims arising out of events that had occurred before November 21, 1991, the effective date of the Civil Rights Act of 1991, would be tried to the court, and that those claims arising out of events after that date would be tried to a jury. At the close of the trial, the case was submitted to the jury on special interrogatories on a form captioned solely as "No. 3:92-cv-737," the docket number assigned to petitioner's October 27, 1992, complaint. On October 14, 1994, the jury returned a verdict in favor of petitioner. The jury found that the Department of Justice had discriminated against petitioner on the basis of sex during the period after November 20, 1991, that the Department had unlawfully retaliated against her during the same period, and that she had been constructively discharged from her employment because of her sex and/or in retaliation for having made and pursued her claims of employment discrimination. The jury awarded $250,000 in compensatory damages for the sex dis-

crimination, $500,000 in compensatory damages for the retaliation, and $750,000 in compensatory damages for the constructive discharge. Pet. App. 132a-134a. The district court reduced the jury's award to $300,000, based on its construction of the cap on compensatory damages set forth in 42 U.S.C. 1981a(b)(3)(D). Pet. App. 134a.

On August 10, 1995, the court entered an order rejecting all of petitioner's claims based on conduct before November 21, 1991. Pet. App. 76a-129a. The court found that the Department of Justice had neither discriminated against petitioner on the basis of sex nor unlawfully retaliated against her before the effective date of the 1991 Act; it upheld the Department's proffered reasons for its adverse personnel actions against petitioner as legitimate and nondiscriminatory (*id.* at 90a) and rejected petitioner's testimony as not credible (*id.* at 92a).

With respect to petitioner's request for reinstatement or front pay based on the violations found by the jury, the court ruled that reinstatement was not appropriate in light of the hostility between petitioner and her employers, the need to displace an innocent third party to find a position for petitioner, petitioner's success in finding other work, and the Department's "genuine dissatisfaction" with petitioner's job performance. Pet. App. 112a. As for petitioner's request for front pay, the district court awarded petitioner, in its back pay award, $164,330.96 from the date of her resignation to the August 17, 1995 date of judgment—a period of almost two years.[1]

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[1] In her complaint, petitioner requested five years of front pay "for a period of five years beginning September 4, 1993"—the date of her resignation. Second Am. Compl., Prayer for

Id. at 110a-111a. The court delined, however, to award front pay from the date of the judgment forward, ruling that such front pay was not necessary to make petitioner whole. *Id.* at 111a-115a. The court stressed that petitioner had gone into the private practice of law immediately upon leaving the U.S. Attorney's Office, that "other employment opportunities would have been available to plaintiff," that petitioner had "approximately 20 years, or more of earning power left," and that petitioner had "fail[ed] to present proof that she makes any less in private practice than she did as an AUSA." *Id.* at 113a-114a. The court therefore concluded that "[a]n award of front pay would, in essence, give plaintiff a windfall of having two salaries—one from her former position as AUSA and one from her present position as a practicing attorney in a private law firm." *Id.* at 115a. In such circumstances, the court held, "neither reinstatement nor an award of front pay are necessary in order to make plaintiff whole as a consequence of her constructive discharge." *Ibid.*

On January 16, 1996, the district court partially granted and partially denied petitioner's request for an award of costs and attorney's fees. Pet. App. 35a-75a. As is pertinent here, the court rejected petitioner's argument that fees for her Washington, D.C., counsel should be awarded based on prevailing rates in Washington, and instead awarded fees based on the local market rate in Knoxville. *Id.* at 54a. The court also disallowed compensation for some hours of work

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Relief ¶(i). The district court's "back pay" award from the date of her resignation to the August 17, 1995 date of the judgment thus awarded almost two years of the five years' front pay demanded by petitioner.

performed by petitioner's counsel because it related to the preparation of proposed findings of fact and conclusions of law on the non-jury portion of the trial, in which petitioner did not prevail. *Id.* at 59a-61a. Finally, the court found that some representation by one of petitioner's attorneys was duplicative and mostly "behind the scenes," and therefore reduced the amount of compensable time for that attorney's representation by 25%. *Id.* at 67a-68a.

4. The court of appeals affirmed. First, the court held that the cap on damages in Title VII actions imposed by 42 U.S.C. 1981a(b)(3)(D) applies to limit the total amount of damages that may be awarded to a complainant in a lawsuit, regardless of the number of claims presented, rather than (as petitioner argued) the amount of damages that may be awarded on each claim presented by a plaintiff within any Title VII suit. Pet. App. 9a-16a. Noting that "[u]nder the plain language of the statute, the cap on compensatory damages applies to each complaining party in an 'action,'" the court concluded that this language made clear that "the § 1981a caps apply to each party in an action, not to each claim, and there is nothing in the language of the statute to indicate otherwise." *Id.* at 11a-12a In so holding, the court refused to accord weight to the contrary interpretation set forth in an *amicus curiae* brief filed by the Equal Employment Opportunity Commission (EEOC) in an Eleventh Circuit case, stating that "the EEOC's interpretation is entitled to no deference when its position is at odds with the plain language of the statute." *Id.* at 15a.

The court of appeals also affirmed the district court's denial of reinstatement and front pay. Pet. App. 16a-22a. With respect to reinstatement, the court sustained the district court's findings that peti-

tioner had found other work, that the working relationship between her and the Department of Justice had been destroyed, and that the Department was "legitimately dissatisfied" with petitioner. *Id.* at 18a.

As for front pay, the court found petitioner's challenge to its denial to be "moot in light of [its] holding that the cap on compensatory damages set forth in Section 1981a of the 1991 Civil Rights Act applies to lawsuits as a whole and not merely to claims." Pet. App. 18a-19a. The court emphasized that the damages cap in Section 1981a(b)(3)(D) imposed a $300,000 limit (in this case) on any compensatory damages awarded for, among other things, "future pecuniary losses." *Id.* at 19a. Relying on dictionary definitions of the words "future pecuniary losses" (*id.* at 20a), the court concluded that front pay is a type of compensatory damages for future pecuniary losses because "it is a monetary award for the salary that the employee would have received but for the discrimination." *Id.* at 21a.

The court acknowledged that many courts, including the Sixth Circuit, had awarded front pay as a remedy for discrimination before the enactment of the Civil Rights Act of 1991. The court also noted that the 1991 Act "excludes from the Act's damages cap 'back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.'" Pet. App. 20a (emphasis omitted) (quoting 42 U.S.C. 1981a(a)(1)). The court ruled, however, that, in contrast to back pay, front pay "is not specifically 'authorized' by § 706(g)." *Id.* at 21a. It also noted that in the Sixth Circuit, the *amount* of front pay (as opposed to its availability) had been viewed "as a legal, rather than an equitable,

remedy" and thus a question for the jury rather than the court. *Ibid.*

Finally, the court rejected petitioner's challenges to the award of attorney's fees. Pet. App. 30a-34a. It upheld the district court's decision to compensate Washington, D.C., counsel at the market rate in Knoxville, finding that "it is not an abuse of discretion for a [district] court to apply local market rates." *Id.* at 32a. The court also upheld the court's disallowance of fees for post-trial work done on the nonjury portion of the case, since "[i]t is beyond peradventure that a District Court may exclude time for work on a claim on which the plaintiff did not prevail." *Id.* at 33a. And it affirmed as not clearly erroneous the 25% reduction of fees for one attorney as duplicative. *Id.* at 33a-34a.

ARGUMENT

1. Petitioner contends (Pet. 13-19) that the court of appeals erred in concluding that the cap on damages in Title VII actions imposed by 42 U.S.C. 1981a applies to limit the total damages that may be awarded for all of the claims of each complaining party brought in any lawsuit, rather than the damages for each individual claim of each party. The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted on this contention.

Section 1981a(a)(2) provides: "*In an action* brought by a complaining party under the powers, remedies, and procedures set forth in [42 U.S.C. 2000e-5 and 2000e-16], against a respondent who engaged in unlawful intentional discrimination * * * the complaining party may recover compensatory and punitive dam-

ages as allowed in subsection (b) of this section." (Emphasis added.) Section 1981a(b)(3), in turn, states that "[t]he sum of the amount of compensatory damages awarded under this section * * * and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party," various sums dependent on the size of the defendant (in this case, $300,000). The court of appeals correctly concluded that, under the plain meaning of the statute's reference to "an action," the $300,000 limit applies to limit the total damages for all the claims brought in any lawsuit (or "action") against a defendant. The limit does not, as petitioner contends, merely limit the amount of damages that may be awarded for each claim pled and proven against the defendant in a lawsuit, regardless of the number of such claims.

"In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc.* v, *Snyder*, 469 U.S. 153, 164 (1985). The ordinary meaning of the word "action," in the context of federal civil litigation, is simply a "civil action," *i.e.*, a lawsuit. An "action" is generally defined as "a suit brought in a court." *Black's Law Dictionary* 28 (6th ed. 1991). The Federal Rules of Civil Procedure similarly use the term "action" or "civil action" to describe any lawsuit presenting claims for relief. See Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Similarly, Title VII provides that "a civil action may be brought against the respondent named in the charge" of unlawful discrimination, 42 U.S.C. 2000e-

5(f)(1), and that a federal employee "may file a civil action as provided in [Section] 2000e-5," 42 U.S.C. 2000e-16(c). Because Congress is presumed to have been aware of this legal background, it should also be presumed to have intended that the word "action" be taken to mean a "lawsuit," and that the caps on damages "[i]n an action" apply to each lawsuit, rather than each claim for relief.[2]

Petitioner argues, however, that the term "action" is ambiguous, and thus resort must be had to the legislative history and "authoritative interpretations" of statute. Pet. 14-15. Even if the statutory cap language were ambiguous, the ambiguity would be resolved in favor of a narrow construction because the provisions for damages in Section 1981a apply to the federal government as well as private parties. The cap on compensatory damages is a limitation on the waiver of the government's sovereign immunity and, as such, must be strictly construed. See *Lane* v. *Peña*, 518 U.S. 189, 192 (1996). In a context similar to this one, this Court rejected a broad construction of a fee provision in the Clean Air Act because the statute "affects fee awards against the United States, as well as against private individuals." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

The legislative history of the 1991 Act provides little support for petitioner's reading of the statute in any event. As an initial matter, this Court has

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[2] As the court of appeals also observed (Pet. App. 12a n.4), its construction of the damages caps is consistent with case law holding that Section 1981a limits the total of both compensatory and punitive damages under a single cap. See *EEOC* v. *AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Hogan* v. *Bangor & Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995).

cautioned that the legislative history of the 1991 Act is, in many respects, an unreliable guide to interpretation of the Act. See *Landgraf* v. *USI Film Products*, 511 U.S. 244, 263 n.15 (1994). The legislative history cited by petitioner is, moreover, not probative on the question at hand. Petitioner relies, for example, on an "interpretive memorandum" submitted by five sponsors of the bill, which states that the caps also are placed on "the damages available to each individual complaining party for each cause of action brought under section 1981[a]." 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991); *id.* at S15,484 (daily ed. Oct. 30, 1991). As the court of appeals concluded, however (Pet. App. 14a), that passage in the memorandum was not addressing the question presented here, but was "simply making it clear that the § 1981a caps did not apply to claims [under 42 U.S.C. 1981] so that an award for sex discrimination under § 1981a would not cap an award for race discrimination under § 1981." Petitioner also relies (Pet. 16-17 n.9) on floor remarks made by Representative Edwards after the 1991 Act was passed by the House but before it was signed by the President. The court of appeals correctly rejected reliance on those post-passage "isolated remarks of a single member of Congress." Pet. App. 14a (citing *Landgraf*, 511 U.S. at 263 n.15); see *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993) (noting that "subsequent legislative history" is a hazardous basis for inferring congressional intent); *Chrysler Corp* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

Petitioner also relies (Pet. 17) on an *amicus curiae* brief filed in the Eleventh Circuit by the Equal Em-

ployment Opportunity Commission (EEOC) in *Reynolds* v. *CSX Transportation, Inc.*, No. 95-3364 (filed May 23, 1996). The position taken in that brief, however, has been rejected by the Solicitor General, who has exclusive litigation authority to present the position of the United States in this Court, absent express authorization otherwise (which does not exist here). See 28 U.S.C. 518(a); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994). The position articulated in this brief is that of the United States. The position previously articulated by the EEOC in *Reynolds*, therefore, is not owed deference by this Court.[3]

2. Petitioner contends (Pet. 9-10) that the court of appeals erred in ruling that an award of front pay is compensation for "future pecuniary losses," and is therefore subject to the damages caps of Section 1981a. Petitioner also argues that this ruling conflicts with the Seventh Circuit's decision in *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944 (1998). The position adopted by the court of appeals on this issue was not advanced by the government below. Nonetheless, this Court's review of this issue would not be appropriate in this case, because the ruling below does not conflict with *Williams* on the precise front pay issue presented here, and because the district court's denial of front pay is independently sustainable on other grounds.

Contrary to petitioner's contention, the Sixth Circuit's ruling that front pay is subject to the damages

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[3] The Eleventh Circuit did not reach the issue of the damages caps in its decision in *Reynolds*. See *Reynolds* v. *CSX Transportation, Inc.*, 115 F.3d 860 (1997), vacated, 118 S. Ct. 2364 (1998).

caps of Title VII does not conflict with anything in the Seventh Circuit's decision in *Williams*, which did not address that issue. In *Williams*, the court ruled that a district court may award front pay in addition to damages awarded by the jury for lost future earnings. The court reasoned that the two forms of compensation redress different injuries; front pay compensates the plaintiff for the immediate effects of the unlawful termination of her past employment, whereas an award for lost future earnings may compensate her for earning capacity lost through damages to her professional standing and reputation. 137 F.3d at 953. And while front pay awards are generally limited in duration to the time in which the plaintiff is unable to secure employment, an award for lost future earnings reflects "[t]he reputational or other injury that * * * can stay with the employee indefinitely." *Id.* at 954.

The *Williams* court did not address the issue decided by the court below, namely, whether front pay is a kind of compensation for "future pecuniary losses" that is subject to the damages cap of Section 1981a(b)(3). It is true that, in *Williams*, the Seventh Circuit affirmed a judgment that included both a damages award capped at $300,000 and an award of front pay. 137 F.3d at 947-948. It appears, however, that the defendant in *Williams* did not argue that the damages cap should cover any award for front pay. Accordingly, the *Williams* decision does not constitute circuit precedent on that question.

In addition, this particular case is ill suited for review of the front pay issue because the district court's decision to deny front pay was clearly not an abuse of discretion under the well settled standards applicable to equitable relief under Title VII. See

Shore v. *Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985) (front pay "does not lend itself to a *per se* rule" but "must be governed by the sound discretion of the trial court and may not be appropriate in all cases").

"Front pay gives the employee the earnings she would have received had she been reinstated to her old job. But since the employee has a duty to mitigate damages, she may have taken another job in the interim, [and] * * * [g]iving the employee the earnings from her old job without taking account of her earnings from her new (or expected) job would result in overcompensation." *Williams*, 137 F.3d at 953-954 (citation omitted). The district court found, and petitioner does not dispute, that petitioner secured other employment immediately upon resigning her job as an Assistant U.S. Attorney, going "into private practice in Knoxville as a partner in the law firm of Ailor, Andrews & Hudson." Pet. App. 88a. The district court also noted that "[t]he record establishes that other employment opportunities would have been available to [petitioner]," *id.* at 113a, that "there has been no proof that [petitioner] needs financial assistance to help her bridge the gap between her former and present jobs," and that petitioner had failed "to present proof that she makes any less in private practice than she did as an AUSA," *id.* at 114a. Thus, "[t]here is no evidence in the record that the termination of [petitioner's] federal employment has caused her any loss of income." *Id.* at 114a-115a. Because the purpose of front pay is to rectify the harm caused by discrimination, *Shore*, 777 F.3d at 1159, such an award was not appropriate in this case.

In addition, front pay is generally viewed as a substitute for reinstatement, where reinstatement is

unavailable for various reasons such as hostility between the parties or the need to protect an innocent third party. See *Shore*, 777 F.3d at 1159. Where reinstatement would be improper because of an employer's legitimate dissatisfaction with the employee, and in particular because of the employee's misconduct, such that the employer would terminate the employee on lawful grounds, a district court could in some circumstances be justified in denying front pay as well as reinstatement. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 361-362 (1995) (emphasizing that, "[i]n determining appropriate remedial action, the employee's wrongdoing becomes relevant," and that, "as a general rule in cases [involving employee wrongdoing], neither reinstatement nor front pay is an appropriate remedy"). The district court's findings in this case that petitioner had engaged in misconduct (see Pet. App. 84a-87a, 99a, 104a, 106a) are more than sufficient to justify a denial of front pay.

3. Petitioner seeks review of the court of appeals' decision affirming various rulings by the district court on attorney's fees. None of those rulings, however, implicates any conflict among the circuits or divergence from any decision of this Court. Furthermore, the fee issues are entirely fact-bound and peculiar to this case. District court decisions on attorney's fees are subject to review only for abuse of discretion, see *Pierce* v. *Underwood*, 487 U.S. 552, 557-563 (1988); *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), and the court of appeals faithfully applied that standard, Pet. App. 32a-34a. Further review is therefore not warranted.

Petitioner first contends that the district court should have awarded fees for her Washington, D.C.,

attorneys at the prevailing market rate in Washington rather than that in Knoxville, where the trial took place. Prevailing parties in Title VII cases are entitled only to "reasonable" attorney's fees, see *Hensley*, 461 U.S. at 435; *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-561 (1986), and reasonable fees "are to be calculated according to the prevailing market rates in the relevant community." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). That is precisely the test applied by the district court. Pet. App. 53a. Title VII does not require that plaintiffs be able to obtain the most expensive counsel available nationwide; a reasonable fee is merely one that is "adequate to attract competent counsel." *Blum*, 465 U.S. at 897. Although there may be circumstances in which additional compensation is warranted for particularly expert counsel, petitioner does not contend that "competent" Title VII counsel was unavailable in the Knoxville, Tennessee area, and the district court found that competent local counsel was available, see Pet. App. 54a. Use of local market rates was therefore not an abuse of discretion.

Petitioner further contends that the district court abused its discretion in reducing the fees of one of petitioner's attorneys by 25% for duplication of effort. The district court's factual determination on this issue is entitled to great weight, however, for the court observed the trial proceedings and was in the best position to assess what was duplicative and what was not. See *Pierce*, 487 U.S. at 560. There is also no merit to petitioner's challenge to the trial court's refusal to award her attorney's fees for post-trial work in the case. The district court emphasized that the only post-trial work for which it refused to award fees was the work that related "to the preparation of

[petitioner's] proposed findings of fact and conclusions of law in the non-jury portion of the trial in which plaintiff did not prevail." Pet. App. 59a. "It is beyond peradventure that a District Court may exclude time for work on a claim on which the plaintiff did not prevail." *Id.* at 33a; see *Hensley*, 461 U.S. at 436-437 ("[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success"); *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) ("We have already observed that if 'a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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